No. 05-18
Title: Arlington Central School District Board of Education, Petitioner
v.
Pearl Murphy, et vir
Docketed: June 30, 2005
Lower Ct: United States Court of Appeals for the Second Circuit
Case Nos.: (03-7850-cv)
Decision Date: March 29, 2005

Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Jun 27 2005	Petition for a writ of certiorari filed. (Response due August 1, 2005)
Jul 26 2005	Order extending time to file response to petition to and including September 1, 2005.
Aug 30 2005	Brief of respondents Pearl Murphy, et vir in opposition filed.
Sep 13 2005	Reply of petitioner Arlington Central School District Board of Education filed. (Distributed)
Sep 14 2005	DISTRIBUTED for Conference of October 7, 2005.
Oct 11 2005	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
Dec 9 2005	Brief amicus curiae of United States filed.
Dec 21 2005	DISTRIBUTED for Conference of January 6, 2006.
Jan 6 2006	Petition GRANTED limited to Question one presented by the petition.
Jan 23 2006	Consent to the filing of amicus briefs in support of either party received from Counsel for the petitioner
Feb 21 2006	Brief amicus curiae of United States filed.
Feb 21 2006	Joint appendix filed.
Feb 21 2006	Brief of petitioner Arlington Central School District Board of Education filed.
Feb 21 2006	Brief amici curiae of National School Boards Association, et al. filed.
Mar 6 2006	SET FOR ARGUMENT on Wednesday, April 19, 2006.
Mar 17 2006	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Mar 23 2006	CIRCULATED.
Mar 27 2006	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Mar 28 2006	Brief of respondents Pearl and Theodore Murphy filed. (Distributed)
Mar 28 2006	Brief amici curiae of National Disability Rights Network and Center for Law and Education filed. (Distributed)
Mar 28 2006	Brief amicus curiae of Council of Parent Attorneys and Advocates filed.

(Distributed)

Apr 12 2006 Record received from U.S.C.A. for 2nd Circuit. (1 envelope)

Apr 12 2006 Reply of petitioner Arlington Central School District Board of Education filed. (Distributed)

Apr 14 2006 Record received from U.S.D.C. Southern District of New York. (1 box)

Apr 19 2006 Argued. For petitioner: Raymond G. Kuntz, Bedford Village, N.Y.; and David B. Salmons, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.) For respondents: David C. Vladeck, Washington, D.C.

Apr 20 2006 Additional record received from U.S.C.A. 2nd Circuit. (1 envelope)

Petition For Writ Of Certiorari Brief Unavailable for Filming at this Time

Opposition Brief Unavailable for Filming at this Time

Reply Brief Unavailable for Filming at this Time

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No. 05-18

In the Supreme Court of the United States

ARLINGTON CENTRAL SCHOOL DISTRICT BOARD OF EDUCATION, PETITIONER

v.

PEARL MURPHY, ET VIR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the fee-shifting provision of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1415(i)(3)(B), which provides that the court may "award reasonable attorneys' fees as part of the costs" to a prevailing party, authorizes an award of expert fees.

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In the Supreme Court of the United States

No. 05-18

ARLINGTON CENTRAL SCHOOL DISTRICT
BOARD OF EDUCATION, PETITIONER

v.

PEARL MURPHY, ET VIR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the order of this Court inviting the Solicitor General to express the views of the United States.

STATEMENT

1. The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.*, provides federal grants to States for assistance in the education of children with disabilities. Under IDEA, a State participating in the grant program must ensure that each child with a disability receives a "free appropriate public education," which includes special-education and related services necessary to meet the child's particular needs. 20 U.S.C. 1400(d)(1)(A) and 1412(a)(1)(A). Local school systems are required to develop an individualized education program (IEP) for each child

with a disability in accordance with statutory requirements. See 20 U.S.C. 1412(a)(4). If the parents are not satisfied with the IEP, they can file a complaint with the State or local educational agency, and they are entitled to "an impartial due process hearing" conducted "by the State educational agency or by the local education agency." 20 U.S.C. 1415(b)(6) and (f)(1). Among other procedural safeguards at the hearing, parents have the "right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities." 20 U.S.C. 1415(h)(1). A party aggrieved by a decision at the final state administrative stage has a right to "bring a civil action with respect to the complaint" in federal district court or "any State court of competent jurisdiction." 20 U.S.C. 1415(i)(2)(A).

Parents who prevail in an action brought under IDEA may be awarded attorneys' fees. IDEA's fee-shifting provision states:

> In any action or proceeding brought under this section, the court, in its discretion, may award *reasonable attorneys' fees as part of the costs* to the parents of a child with a disability who is the prevailing party.

20 U.S.C. 1415(i)(3)(B) (emphasis added).

2. Respondents are the parents of a child with a disability covered by IDEA. In 1999, they commenced this action *pro se* in federal district court pursuant to IDEA, alleging that petitioner had failed to provide a "free appropriate public education" for their child, 20 U.S.C. 1400(d)(1)(A), and was therefore required to pay their child's private school tuition for certain school years. Pet.

App. 2a-3a. Respondents prevailed in district court, and the Second Circuit affirmed that judgment. *Id.* at 3a.[1]

The case returned to the district court and respondents sought fees and costs pursuant to 20 U.S.C. 1415(i)(3)(B), including $29,350 in fees for the services of Marilyn Arons, an educational expert and consultant. Pet. App. 3a. The district court granted the fee request in part. *Id.* at 4a, 17a-43a. The court held that Arons's fees for "expert consulting services" were compensable under the Act from the time respondents requested an administrative due process hearing until they became "prevailing parties" in 2000 when the district court entered judgment in their favor. *Id.* at 4a-5a, 37a-38a. However, the court held that respondents "could not collect 'attorneys' fees' for [Arons] doing work similar to that of an attorney." *Id.* at 4a. Applying that understanding, the court awarded respondents $8650 in expert fees for Arons's services. *Id.* at 5a-6a, 41a-43a.

3. The court of appeals affirmed. Pet. App. 1a-16a. The court acknowledged that in *West Virginia University Hospital, Inc.* v. *Casey*, 499 U.S. 83 (1991), this Court held that virtually identical language in the then-current version of 42 U.S.C. 1988 did not authorize awards of expert fees, because "there was no 'explicit statutory authority' indicating that Congress intended for that sort of fee-shifting." Pet. App. 8a-9a (quoting *Casey*, 499 U.S. at 87). The court found, however, that the statement in the House Conference Committee Report on IDEA's predecessor, the Handi-

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[1] In the initial appeal in this case, the United States filed an amicus brief in support of respondents addressing the application of IDEA's stay-put provision, 20 U.S.C. 1415(j), and petitioner's liability for tuition payments. The brief did not address the availability of attorney or expert fees, which were not at issue before the Second Circuit at that merits stage. U.S. Br., *Murphy* v. *Arlington Cent. Sch. Dist. Bd. of Educ.*, 297 F.3d 195 (2d Cir. 2002) (No. 00-7358).

capped Children's Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796, that "[t]he conferees intend that the term 'attorneys' fees as part of the costs' include reasonable expenses and fees of expert witnesses and the reasonable costs of any test or evaluation which is found to be necessary for the preparation of the . . . case" demonstrated that Congress intended that expert fees be compensable under IDEA. *Id.* at 9a (quoting H.R. Conf. Rep. No. 687, 99th Cong., 2d Sess. 5 (1986)). The court of appeals also noted that this Court, in dicta in a footnote in *Casey*, described this statement in the committee report as "an apparent effort to *depart* from ordinary meaning and to define a term of art," and concluded that this Court thereby intended to distinguish IDEA from Section 1988 as construed in *Casey*. *Ibid.* (quoting *Casey*, 499 U.S. at 92 n.5).

The court of appeals also found it "instructive" that after *Casey*, Congress amended Section 1988 to allow recovery of expert fees in civil rights actions, but took no "similar action with respect to the IDEA." Pet. App. 10a. The court "believe[d] it reasonable to infer that Congress, on the basis of the Supreme Court's decision in *Casey*, saw no need to amend the IDEA because the Court had recognized that, in enacting the IDEA, Congress had sufficiently indicated in the committee report that prevailing parties could recover expert fees under the Act." *Ibid.* In addition, the court reasoned, awarding expert fees was consistent with IDEA's purpose of ensuring that all children with disabilities obtain a free appropriate public education. *Id.* at 11a-12a.

The court of appeals recognized that its decision in this case directly conflicts with the holdings of the Seventh and Eighth Circuits that expert fees are not compensable under IDEA, but stated that its reading of the statute and this Court's cases required it to reject those decisions and, instead, join the Third Circuit in ruling that expert fees

are compensable. See Pet. App. 4a, 7a n.5, 8a (citing *Neosho R-V Sch. Dist.* v. *Clark*, 315 F.3d 1022 (8th Cir. 2003); *T.D.* v. *LaGrange Sch. Dist. No. 102*, 349 F.3d 469 (7th Cir. 2003); *Arons* v. *New Jersey State Bd. of Educ.*, 842 F.2d 58 (3d Cir.), cert. denied, 488 U.S. 942 (1988)); *id.* at 13a.

4. After the Second Circuit issued its decision in this case, a divided panel of the District of Columbia Circuit held—in accord with the rule in the Seventh and Eighth Circuits—that IDEA does not authorize an award of expert fees to prevailing parents. *Goldring* v. *District of Columbia*, 416 F.3d 70 (2005). In so holding, that court specifically acknowledged the Second Circuit's contrary ruling in this case and the conflict in the circuits. *Id.* at 73.

DISCUSSION

The Court should grant the petition for a writ of certiorari in this case to decide whether IDEA's fee-shifting provision authorizes an award of expert fees to prevailing parents. As the Second Circuit expressly acknowledged, the circuits are divided on whether IDEA's fee-shifting provision authorizes reimbursement for such fees. Pet. App. 8a. The Second Circuit's conclusion that the Act allows for the award of expert fees to prevailing parents contradicts the plain language of IDEA and departs from this Court's precedents construing nearly identical statutory provisions. Resolution of this conflict is warranted in view of the recurring nature of the expert-fee issue in IDEA litigation, Congress's efforts to reduce IDEA-related litigation costs, and the need to ensure IDEA's uniform application.

A. The Circuits Are Divided On Whether Expert Fees Are Recoverable Under IDEA's Fee-Shifting Provision

1. As both the Second Circuit below (Pet. App. 7a-8a) and respondents (Br. in Opp. 2-3) have acknowledged, the

Second Circuit's holding that Section 1415(i)(3)(B) authorizes the award of expert fees to prevailing parents squarely conflicts with the decisions of other federal courts of appeals.

a. Most recently, the District of Columbia Circuit in *Goldring* v. *District of Columbia*, 416 F.3d 70, 73 (2005), addressed whether Section 1415 "enables a prevailing party to recover expert fees as part of his costs." In so doing, it acknowledged the conflict among the circuits on this issue and expressly considered and rejected the reasoning and holding of the Second Circuit in this case. *Ibid.* Indeed, in rejecting the Second Circuit's approach, the court stated that the "correct decision does not seem to us to be difficult to reach, for the Supreme Court has stated in fairly unequivocal terms that language nearly identical to that used in section 1415 is unambiguous and, more to the point, does not allow a prevailing party to shift his expert fees." *Ibid.*

The District of Columbia Circuit reasoned that its conclusion "flows directly from the application of two Supreme Court decisions," namely, *Crawford Fitting Co.* v. *J.T. Gibbons, Inc.*, 482 U.S. 437 (1987), and *West Virginia University Hospital, Inc.* v. *Casey*, 499 U.S. 83 (1991). *Goldring*, 416 F.3d at 74 (citation omitted). As the District of Columbia Circuit explained, *Crawford* held that, in awarding fees to the prevailing party for expert services, a court is limited to the costs allowed by 28 U.S.C. 1821(b), "absent contract or explicit statutory authority to the contrary," 416 F.3d at 73 (citing *Crawford*, 482 U.S. at 439). *Casey*, in turn, held that language materially identical to IDEA's fee-shifting provision contained in Section 1988 "contains no such 'explicit statutory authority to the contrary,'" *ibid.* (quoting *Casey*, 499 U.S. at 86).

Accordingly, the court in *Goldring* concluded that the logic of *Crawford* and *Casey* controls whether expert fees are recoverable under IDEA:

> [B]ecause section 1415 and the version of section 1988 construed in *Casey* contain materially identical language and *Casey* held that section 1988's language does not enable a prevailing party to shift his expert fees, we cannot but conclude that section 1415 does likewise. That is the end of the matter for us.

416 F.3d at 74. In so holding, the court emphatically refused to alter its interpretation on the basis of the conference report accompanying IDEA's fee-shifting provision, which stated that "[t]he conferees intend that the term 'attorneys' fees as part of the costs' include reasonable expenses and fees of expert witnesses and the reasonable costs of any test or evaluation which is found to be necessary for the preparation of the * * * case." *Ibid.* (quoting H.R. Conf. Rep. No. 687, 99th Cong., 2d Sess. 5 (1986)). The court explained that "[a] sentence in a conference report cannot rewrite unambiguous statutory text." *Id.* at 75.[2]

b. The Eighth Circuit took the same approach two years earlier in *Neosho R-V School District* v. *Clark*, 315 F.3d 1022 (8th Cir. 2003). It upheld the district court's refusal in that case to award expert fees under the IDEA.

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[2] Judge Rogers dissented. Relying on the same line of analysis adopted by the Second Circuit in this case, she reasoned that the reference to expert fees in the conference report accompanying IDEA's fee-shifting provision distinguished this Court's decisions in *Casey* and *Crawford* and required a different interpretation of the statute's text. See 416 F.3d at 79-83. Accordingly, Judge Rogers concluded that "the statutory phrase 'attorney's fees as part of the costs' * * * authorize[d] the shifting of fees for experts' services." *Id.* at 82. As respondents noted (Br. in Opp. 3 n.1), the parents petitioned for rehearing in *Goldring*. On November 10, 2005, that rehearing petition was denied.

The court explained that the "'apparent effort' to define a term of art in the legislative history [was] an unsuccessful one" because Congress had not engaged in the sort of "'explicit statutory' authorization" required under *Crawford* to "exceed the limitations of the general cost statutes." *Id.* at 1032. The court also explained that "costs" "is an ordinary term with which federal judges are well acquainted" and that "[a]bsent a specific definition of costs" in the statutory text, courts must "look to the general provisions providing for the taxation of costs in federal courts as a matter of course." *Id.* at 1031.

c. The Seventh Circuit in *T.D.* v. *LaGrange School District No. 102*, 349 F.3d 469, 481 (7th Cir. 2003), expressly "agree[d] with the Eighth Circuit's reasoning and conclusion" in *Neosho*. It too held that, under *Crawford* and *Casey*, an "explicit statutory authorization was necessary to allow courts to exceed the limitations under 28 U.S.C. § 1821 and § 1920," and that no authorization was present in the IDEA. *Id.* at 482. The court similarly refused to find such authorization in the legislative history of IDEA's fee-shifting provision. *Ibid.*

d. In contrast, the Second Circuit below expressly rejected the reasoning of the Seventh and Eighth Circuits, Pet. App. 7a-8a, and squarely held that "Congress intended to and did authorize the reimbursement of expert fees in IDEA actions." *Id.* at 8a. In so holding, the Second Circuit grounded its interpretation on the same language in the conference report that the Seventh, Eighth, and District of Columbia Circuits expressly rejected. *Id.* at 9a-11a. Indeed, the court reasoned that this Court's reference to that legislative history in *Casey* actually "require[d]" the court

to construe IDEA to authorize the recovery of expert fees. *Id.* at 9a.[3]

2. Respondents suggest (Br. in Opp. 3) that granting a writ of certiorari in this case would be premature because several circuits have yet to address the question whether expert fees are available under IDEA's fee-shifting provision. For several reasons, that suggestion should be rejected. First, the conflict that does exist is clear and sufficiently developed to warrant the Court's review at this time. This Court generally does not wait until all the Circuits have spoken before addressing an issue on which they have divided. Second, the question whether expert fees are recoverable under IDEA is frequently recurring and the Second Circuit's decision in this case could lead to increased litigation costs for parents and schools and divert attention and resources from the core purposes of IDEA. As this Court recently emphasized, "there is reason to believe that a great deal is already spent on the administration of the [IDEA]" and "Congress has * * * repeatedly amended the Act in order to reduce its administrative and litigation-related costs." *Schaffer* v. *Weast*, 126 S. Ct. 528, 535 (2005). Third, the Second Circuit's rule is likely to have a

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[3] Both the Second Circuit below and the District of Columbia Circuit in *Goldring* interpreted the Third Circuit's decision in *Arons* v. *New Jersey State Bd. of Educ.*, 842 F.2d 58 (3d Cir.), cert. denied, 488 U.S. 942 (1988), as holding—in line with the Second Circuit—that expert fees are recoverable under the IDEA's fee-shifting provision. See Pet. App. 7a n.5, 13a; *Goldring*, 416 F.3d at 73. Respondent also has interpreted *Arons* as adopting the same approach as the Second Circuit on this issue. Br. in Opp. 3-4. The Third Circuit in *Arons* stated that "nothing prevents [an expert] from receiving compensation for work done as an expert consultant." 842 F.2d at 62. The court did not, however, directly address whether IDEA itself authorizes the award of such fees to the prevailing parents. Accordingly, it is not clear that the Third Circuit has squarely taken a position on this issue.

significant impact on schools in that Circuit alone, because a substantial percentage of all litigation under IDEA takes place within the Second Circuit and, in particular, in New York.[4] Fourth, the Second Circuit's position conflicts not just with decisions of other circuits, but with the text of IDEA and this Court's precedents, as well.

Furthermore, this case presents a good vehicle to resolve the existing circuit conflict. The case squarely presents the question whether expert fees are recoverable under the IDEA's fee-shifting provision. The Second Circuit directly addressed that question. And this case presents a common fact pattern in which the question has arisen, *i.e.*, where prevailing parents seek fees for expert consulting services in IDEA litigation.[5]

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[4] See General Accounting Office, *Special Education: Numbers of Formal Disputes Are Generally Low and States Are Using Mediation and Other Strategies to Resolve Conflicts*, No. GAO 03-897, 13-14 (Sept. 2003) (finding that nearly 80% of all due process hearings nationwide under IDEA occur in just five States and the District of Columbia and that New York has the highest rate of due process hearings per 10,000 students receiving special education benefits of any State).

[5] Expert consulting services typically include reviewing materials gathered by teachers and administrators, observing the student in class, interviewing teachers and administrators, attending IEP meetings, contacting various schools regarding placement possibilities, preparing technical reports, and advising parents in their decision-making. See *Arons*, 842 F.2d at 60; *J.S.* v. *Ramapo Cent. Sch. Dist.*, 165 F. Supp. 2d 570, 572 (S.D.N.Y. 2001); *Coale* v. *State Dep't of Educ.*, 162 F. Supp. 2d 316, 321 (D. Del. 2001); *Connors* v. *Mills*, 34 F. Supp. 2d 795, 808 (N.D.N.Y. 1998); *Straube* v. *Florida Union Free Sch. Dist.*, 801 F. Supp. 1164, 1178 n.13 (S.D.N.Y. 1992); *In re Arons*, 756 A.2d 867, 868 (Del. 2000), cert. denied, 532 U.S. 1065 (2001). Such expert services of Arons herself have been the subject of a number of reported decisions. See *Arons*, 842 F.2d at 60; *J.S.*, 165 F. Supp. 2d at 572; *Coale*, 162 F. Supp. 2d at 321; *Connors*, 34 F. Supp. 2d at 799; *Straube*, 801 F. Supp. at 1178 n.13; *In re Arons*, 756 A.2d at 869. While the question presented

B. The Second Circuit Rule That Expert Fees Are Recoverable Under IDEA Contradicts Both The Express Terms Of The Act And This Court's Precedents

The Second Circuit's ruling that IDEA authorizes the reimbursement of expert fees is inconsistent with both the plain terms of IDEA and with this Court's decisions.

1. a. The text of IDEA unambiguously authorizes only the award of attorneys' fees—and not expert fees—to parents who prevail in IDEA litigation. Section 1415(i)(3)(B) provides that courts "may award reasonable attorneys' fees as part of the costs." 20 U.S.C. 1415(i)(3)(B). It nowhere mentions "expert fees." That omission is particularly telling because Congress knows how to expressly authorize the award of both "attorney's fees" and "expert fees," and has done so in numerous other statutes. See *Casey*, 499 U.S. at 89 (noting that "[a]t least 34 statutes in 10 different titles of the United States Code explicitly shift attorney's fees *and* expert witness fees"). The text of IDEA's fee-shifting provision thus conclusively demonstrates that Congress authorized reimbursement of only "attorneys' fees."[6]

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also has arisen in the context where prevailing parents have sought fees for experts who have testified at a due process hearing, there is no reason to conclude that the availability of a fee award under IDEA would turn on the type of expert services provided.

[6] That conclusion is bolstered by Section 1415(i)(3)(F), which directs a court to reduce "the amount of attorneys' fees awarded under this section" whenever it finds certain specified facts that are explicitly directed to "attorneys" and "legal services." 20 U.S.C. 1415(i)(3)(F). If Congress intended Section 1415(i)(3)(B) to authorize the reimbursement of expert fees as well as attorneys' fees, there is no reason to believe that Congress would have gone to such great lengths in Section 1415(i)(3)(F) to identify circumstances in which an award of *attorneys'* fees should be reduced but have remained silent as to *expert* fees.

Section 1415(i)(3)(B)'s reference to "costs" cannot be interpreted without regard to the immediately preceding phrase "attorneys' fees," and, in any event, the reference to "costs" may not be construed to include "expert fees." The costs that a judge or clerk of "any court of the United States may tax" are statutorily defined in 28 U.S.C. 1920. The only recoverable costs that might apply to an expert in an IDEA action are found in 28 U.S.C. 1920(3): "Fees and disbursements for printing and witnesses." But those fees are limited to those set out in 28 U.S.C. 1821, *i.e.*, travel expenses and a per diem of $40. See, *e.g.*, *Sierra Club* v. *EPA.*, 769 F.2d 796, 812 (D.C. Cir. 1985) (denying request for compensation for a "technical consultant" because his services did "not fall under the traditional concept of costs * * * which ordinarily encompasses items such as filing fees or other court costs"). The expert fees at issue in this case are for consulting services, not for a witness, and are not capped at $40 per diem. And, needless to say, if expert consulting fees are neither attorney's fees nor costs they cannot come within the authorization for recovering "attorneys' fees as part of the costs."

b. The background principles against which IDEA must be construed also preclude any interpretation of the phrase "attorneys' fees as part of the costs" to authorize the award of expert fees. IDEA is Spending Clause legislation that conditions federal financial assistance on compliance with the Act's requirements. See *Schaffer*, 126 S. Ct. at 531-532; *Board of Educ.* v. *Rowley*, 458 U.S. 176, 190 n.11 & 204 n.26 (1982); *Cedar Rapids Comm. Sch. Dist.* v. *Garret F.*, 526 U.S. 66, 83 (1999) (Thomas, J., joined by Kennedy, J., dissenting) ("[b]ecause IDEA was enacted pursuant to Congress' spending power, our analysis of the statute in this case is governed by special rules of construction"). Given this Court's repeated admonition that "if Congress

intends to impose a condition on the grant of federal moneys, it must do so unambiguously," *Barnes* v. *Gorman*, 536 U.S. 181, 186 (2002) (quoting *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981)), there would no basis to hold that, in the face of statutory and regulatory silence, IDEA nevertheless conditions federal funds on the requirement that States may be required to pay expert fees *in addition to* attorneys' fees to parents who prevail in an action or proceeding under the Act.

2. A plain-meaning interpretation of IDEA's fee-shifting provision is similarly compelled by this Court's decisions. In *Casey*, the Court addressed whether the then-current version of 42 U.S.C. 1988 authorized the award of fees to the prevailing party for the services of experts in civil rights litigation. At the time, Section 1988 authorized courts in various civil rights actions to award "a reasonable attorney's fee as part of the costs." 42 U.S.C. 1988; see 499 U.S. at 84-85 & n.1. The fee-shifting provision of Section 1988 at issue in *Casey* thus contained language identical to the key language of IDEA's fee-shifting provision at issue here. See 20 U.S.C. 1415(i)(3)(B) (court may award "reasonable attorneys' fees as part of the costs").

This Court in *Casey* explained that Sections 1920 and 1821 "define the full extent of a federal court's power to shift litigation costs absent express statutory authorization to go further." *Casey*, 499 U.S. at 86. As the Court had previously held in *Crawford*, Section 1920 is "an express limitation upon the types of costs which, absent other authority, may be shifted by federal courts." *Id.* at 87 (citing *Crawford*, *supra*). Because Section 1920 does not authorize "fees for services rendered by an expert employed by a party in a nontestimonial advisory capacity," such fees are not compensable absent "explicit statutory authority." *Ibid.* And, with respect to testifying expert witnesses, "ex-

plicit statutory authority" is necessary to overcome Section 1821's limitation on fees for such experts. *Ibid.* Thus, the Court held, the term "costs" does not include fees for experts who do not testify, nor does it include fees for a testifying expert in excess of those provided by Section 1821. *Id.* at 87 & n.3.

Casey therefore rejected the contention that expert fees could be part of the "costs" allowed by Section 1988. 499 U.S. at 87 n.3. Instead, the Court explained, the question before it was whether the term "attorney's fee" in Section 1988 provides the required "explicit statutory authority" necessary for a district court to award both testimonial and nontestimonial expert fees. *Id.* at 87. The Court held that it did not, primarily because "[t]he record of statutory usage demonstrates convincingly that attorney's fees and expert fees are regarded as separate elements of litigation cost." *Id.* at 88. If "attorney's fees" included expert fees, the Court reasoned, then "dozens of statutes referring to the two separately become an inexplicable exercise in redundancy." *Id.* at 92. In addition, when Congress enacted Section 1988, court cases showed that expert fees were not considered an element of attorney's fees. *Ibid.* The Court also rejected petitioner's reliance on legislative history, and emphasized that where the statutory text "contains a phrase that is unambiguous—that has a clearly accepted meaning in both legislative and judicial practice—we do not permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process." *Id.* at 98-99.

Because the key language in IDEA's fee-shifting provision ("attorneys' fees as part of the costs") is identical to the statutory language at issue in *Casey*, *Casey* compels the conclusion that IDEA's fee-shifting provision does not authorize reimbursement for expert fees. See *Goldring*, 416

F.3d at 73 ("[t]he correct decision does not seem to us to be difficult to reach, for the Supreme Court has stated in fairly unequivocal terms that language nearly identical to that used in section 1415 is unambiguous and, more to the point, does not allow a prevailing party to shift his expert fees"); *LaGrange*, 349 F.3d at 482 (finding that IDEA fee-shifting provision does not authorize award of expert witness fees, "particularly, in light of the fact that the Supreme Court in *Casey* found that the same words used in the former § 1988 ('reasonable attorney's fee as part of costs') did not provide the necessary explicit statutory authorization"); *Neosho*, 315 F.3d at 1032-1033 (noting that *Casey* "specifically indicated that the term 'costs' should be construed narrowly as not including expert witness fees").

3. As the District of Columbia Circuit concluded in *Goldring*, the Second Circuit's attempts to distinguish *Casey* and *Crawford* are flawed. First, recourse to legislative history to determine whether Congress intended to shift expert fees in the IDEA "is simply unwarranted" because in *Casey*, this Court held that the phrase "attorneys' fees as part of the costs" is clear and unambiguous and warned against resort to committee reports to cloud unambiguous text. 416 F.3d at 74; see *LaGrange*, 349 F.3d at 483; *Neosho*, 315 F.3d at 1032. As this Court recently reiterated, "when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Lamie* v. *United States Trustee*, 540 U.S. 526, 534 (2004). For that reason, the Second Circuit erred by relying on a statement in a committee report accompanying the fee-shifting provision to depart from the plain meaning of the text of that provision. See *Ratzlaf* v. *United States*, 510 U.S. 135, 147-148 (1994) (courts should "not resort to legislative history to cloud a statutory text that is clear").

Second, as the District of Columbia, Seventh, and Eighth Circuits have all properly concluded, the dicta in a footnote in *Casey* upon which the Second Circuit relied does not warrant a different interpretation of IDEA's fee-shifting provision. In that footnote, the Court responded to an argument made by respondent in that case by describing the statement in the committee report relied on by the Second Circuit as merely "an apparent effort to depart from ordinary meaning and to define a term of art." 499 U.S. at 92 n.5. But in light of the plain meaning of the statutory text, "this 'apparent effort' to define a term of art in legislative history is an unsuccessful one." *Neosho*, 315 F.3d at 1032; accord *LaGrange*, 349 F.3d at 482; *Goldring*, 416 F.3d at 75. The statement simply does not constitute the type of "explicit authority" required to allow an award of expert fees beyond the limitations of the general cost statutes. *Casey*, 499 U.S. at 86-87; *Neosho*, 315 F.3d at 1031.

The Second Circuit's effort to attach significance to the fact that Justice Scalia was the author of the *Casey* footnote is also without merit. Pet. App. 10a-11a. The opinion in *Casey* was written for the Court, not a single Justice. Nothing in the footnote indicates that the Court would deem the committee report's "apparent effort" to supplement the statutory text to have been a *successful* effort. To the contrary, the Court in *Casey* made clear that it is improper even to look to legislative history where, as there and here, a statutory term is unambiguous. See 499 U.S. at 99-100. This case involves precisely the same statutory terms and calls for the same result.

Third, the Second Circuit further erred by concluding that it was "reasonable to infer that Congress, on the basis of the Supreme Court's decision in *Casey*, saw no need to amend the IDEA because the Court had recognized that, in enacting the IDEA, Congress had sufficiently indicated in

the Conference Committee Report that prevailing parties could recover expert fees under the Act." Pet. App. 10a. As the District of Columbia Circuit pointed out in *Goldring*, it is more reasonable to infer from Congress's failure to amend IDEA's fee-shifting provision following *Casey* that "Congress had no intention of allowing recovery of expert fees under the IDEA." 416 F.3d at 76. This is so because (1) at most, *Casey* stated that the committee report was only an "apparent effort" by the congressional committee to depart from the ordinary meaning of the statutory phrase "attorneys' fees as part of the costs"; (2) *Casey* did not include IDEA as an example of a statute that authorizes the shifting of both attorney's fees and expert fees; and (3) "the version of section 1988 construed in *Casey* is nearly identical to section 1415." *Ibid.*[7]

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[7] The court of appeals' inference is belied further by the fact that Congress, in 2004, considered but did not adopt a bill (the Fairness and Individual Rights Necessary to Ensure a Stronger Society: Civil Rights Act of 2004) that would have amended IDEA and numerous other civil rights statutes to explicitly authorize an award of expert fees. See S. 2088, 108th Cong. 2d Sess. (2004); H.R. 3809, 108th Cong. 2d Sess. (2004). The bill explained that its purpose was, *inter alia*, "to allow recovery of expert fees by prevailing parties under civil rights fee-shifting statutes" and that this purpose was "made necessary by the decision of the Supreme Court in [*Casey*]." See S. 2088, *supra*, §§ 521, 522(1). Specifically, it would have provided that "Section 615(i)(3)(B) of the Individuals with Disabilities Education Act (20 U.S.C. 1415(i)(3)(B)) is amended by inserting '(including expert fees)' after 'attorney's fees.'" S. 2088, *supra*, § 523(e). If, as the Second Circuit posited below, Congress already allowed for the recovery of expert fees under IDEA's fee-shifting provision, then Congress would have had no need to include IDEA among the civil rights statutes to be amended by the bill. That bill expired at the end of the 108th Congress. Congress remains free to address this issue as it sees fit, but this Court should resolve the circuit split on the meaning of IDEA's existing fee-shifting provision.

Finally, the Second Circuit's reliance on IDEA's purpose of ensuring that all children with disabilities obtain a free appropriate public education is misplaced. Pet. App. 11a-12a. As the District of Columbia Circuit explained, where, as here, the language of the statute is clear, such policy arguments are insufficient to overcome the express intent of Congress. *Goldring*, 416 F.3d at 76-77. Indeed, in recently holding that parents who initiate due process hearings under the IDEA bear the burden of proving their claims, this Court emphasized that "the touchstone of our inquiry is, of course, the statute," and found no reason to depart from the ordinary rule that the burden of proof falls on the party seeking relief. *Schaffer*, 126 S. Ct. at 534. So too, there is no reason to depart from ordinary rules of statutory interpretation here. That is particularly true given that one of the goals of IDEA, and a key objective of the 2004 Amendments to IDEA, is to reduce the litigation costs for schools under the Act. See *Schaffer*, 126 S. Ct. at 535 (discussing the Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647). Holding that the Act authorizes the award of expert fees would have precisely the opposite effect.

C. The Grant Of Certiorari Should Be Limited To The First Question Presented By The Petition

The petition for a writ of certiorari states two questions: (1) whether IDEA's fee-shifting provision authorizes a court to award "'expert' fees"; and (2) whether IDEA's fee-shifting provision authorizes a court to award fees "for the services for an 'educational consultant.'" Pet. i. There is no reason, however, to parse out two conceptually distinct questions in this case. The question on which the circuits are split and that warrants resolution by this Court is whether IDEA's fee-shifting provision authorizes reim-

bursement of expert fees to prevailing parents. That issue is squarely presented by the Second Circuit's decision in this case holding that respondents are entitled to recover fees for expert services provided by Arons. See Pet. App. 8a ("Congress intended to and did authorize the reimbursement of expert fees in IDEA actions").

Petitioner argues (Pet. 25-28) that the court of appeals' decision encourages the unauthorized practice of law by allowing an award of expert fees for the services of a non-lawyer educational consultant and that the court erred because Arons's "special knowledge or training" was never formally established. Those arguments do not support a separate question presented, nor do they warrant this Court's review. The court of appeals below rejected any fees for Arons's services as a non-attorney advocate, Pet. App. 4a-5a, 38a-43a, and respondents have not challenged that aspect of the court's decision. In any event, the question whether the courts below drew the appropriate line between expert consultation services and non-attorney advocate services, or whether the courts properly found that Arons possessed "special knowledge or training" related to the services she provided, are fact-bound and do not implicate any conflict among the circuits. Accordingly, those questions do not warrant further review.[8]

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[8] In *Arons* v. *Office of Disciplinary Counsel*, 531 U.S. 1034 (2000), this Court called for the views of the Solicitor General on whether IDEA, 20 U.S.C. 1415(h)(1), establishes a federal right to non-lawyer representation in due process hearings. The case arose after state authorities instituted proceedings against an expert consultant (Marilyn Arons) for the unauthorized practice of law. The United States responded that, consistent with the longstanding position of the Department of Education, States that accept funds under IDEA are required to allow qualified non-lawyers to represent parents at due process hearings. See No. 00-509 U.S. Br. 9-12. That issue is not presented by this case, which, as discussed, involves the question

CONCLUSION

The petition for a writ of certiorari should be granted limited to the first question presented.

Respectfully submitted.

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DECEMBER 2005

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whether prevailing parents may be awarded fees under IDEA for expert consulting (but not advocate) services.

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No. 05-18

In the Supreme Court of the United States

ARLINGTON CENTRAL SCHOOL DISTRICT BOARD OF EDUCATION, PETITIONER

v.

PEARL MURPHY, ET VIR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the fee-shifting provision of the Individuals with Disabilities Education Act, 20 U.S.C. 1415(i)(3)(B), which provides that the court may "award reasonable attorneys' fees as part of the costs" to a prevailing party, authorizes an award of expert fees.

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ON WRIT OF CERTIORARI
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BRIEF FOR THE UNITED STATES
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INTEREST OF THE UNITED STATES

This case presents the question whether the fee-shifting provision of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1415(i)(3)(B), which allows the court to "award reasonable attorneys' fees as part of the costs" to the prevailing party in an IDEA action, authorizes an award of expert fees. The Department of Education administers IDEA, and has authority to promulgate regulations necessary to ensure compliance with the Act. See 20 U.S.C. 1417. The United States has participated as an amicus in numerous cases involving the construction of IDEA. See, *e.g.*, *Schaffer* v. *Weast*, 126 S. Ct. 528 (2005); *Cedar Rapids Cmty. Sch. Dist.* v. *Garret F.*, 526 U.S. 66 (1999); *Board of*

Educ. v. *Rowley*, 458 U.S. 176 (1982). At the Court's invitation, the United States filed a brief at the petition stage of this case.

STATEMENT

1. The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.*, provides federal grants to States for assistance in the education of children with disabilities. Under IDEA, a State participating in the grant program must ensure that each child with a disability receives a "free appropriate public education," which includes special education and related services necessary to meet the child's particular needs. 20 U.S.C. 1400(d)(1)(A), 1412(a)(1)(A). Local school systems are required to develop an individualized education program (IEP) for each child with a disability in accordance with statutory requirements. See 20 U.S.C. 1412(a)(4). If the parents are not satisfied with the IEP, they can file a complaint with the State or local educational agency, and they are entitled to "an impartial due process hearing" conducted "by the State educational agency or by the local educational agency." 20 U.S.C. 1415(b)(6) and (f)(1). Among other procedural safeguards at the hearing, IDEA grants parents the "right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities." 20 U.S.C. 1415(h)(1). A party aggrieved by a decision at the final state administrative stage has a right to "bring a civil action with respect to the complaint" in federal district court or "any State court of competent jurisdiction." 20 U.S.C. 1415(i)(2)(A).

Parents who prevail in an action brought under IDEA may be awarded attorneys' fees. IDEA's fee-shifting provision states:

> In any action or proceeding brought under this section, the court, in its discretion, may award *reasonable attorneys' fees as part of the costs* to the parents of a child with a disability who is the prevailing party.

20 U.S.C. 1415(i)(3)(B) (2000) (emphasis added). In practice, attorneys' fees have been awarded both when parents prevail before an administrative hearing and when they prevail in a civil action.[1]

2. Respondents are the parents of a child with a disability covered by IDEA. In 1999, after adminis-trative proceedings before a state agency, they commenced this action pro se in federal district court pursuant to IDEA, alleging that petitioner had failed to provide a "free appropriate public education" for their child, 20 U.S.C. 1400(d)(1)(A), and was therefore required to pay their child's private school tuition for certain school years. Pet. App. 2a-3a. Respondents prevailed in the district court, and the Second Circuit affirmed that judgment. *Id.* at 3a.[2]

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[1] IDEA was reauthorized and amended in numerous respects in 2004. See Pub. L. No. 108-446, 118 Stat. 2647. The fee-shifting provision in the 2004 Act, however, is not materially different. It reads: "In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorney's fees as part of the costs * * * to a prevailing party who is the parent of a child with a disability." Pub. L. No. 108-446, § 615, 118 Stat. 2724 (to be codified at 20 U.S.C. 1415(i)(3)(B)). Unless otherwise indicated, citations are to the statute as it existed prior to the 2004 amendments.

[2] In the initial appeal in this case, the United States filed an amicus brief in support of respondents addressing the application of IDEA's

The case returned to the district court and respondents sought fees and costs, pursuant to 20 U.S.C. 1415(i)(3)(B), including $29,350 in fees for the services of Marilyn Arons, an educational expert and consultant. Pet. App. 3a. The district court granted the fee request in part. *Id.* at 4a, 17a-43a. The court held that Arons's fees for "expert consulting services" were compensable under the Act from the time respondents requested an administrative due process hearing until they became "prevailing parties" in 2000 when the district court entered judgment in their favor. *Id.* at 4a-5a, 37a-38a. However, the court held that respondents "could not collect 'attorneys' fees' for [Arons] doing work similar to that of an attorney." *Id.* at 4a. The court thus distinguished between fees for expert consulting services, which it held are compensable under IDEA's fee-shifting provision, and fees for expert advocacy and representation services, which it held are not compensable. Applying that understanding, the court awarded respondents $8650 in expert fees for Arons's services. *Id.* at 5a-6a, 41a-43a.

3. Petitioner appealed, and the court of appeals affirmed. Pet. App. 1a-16a. The court acknowledged that, in *West Virginia University Hospitals, Inc.* v. *Casey*, 499 U.S. 83 (1991), this Court held that virtually identical fee-shifting language in the then-current version of 42 U.S.C. 1988 did not authorize awards of expert fees, because "there was no 'explicit statutory authority' indicating that Congress intended for that sort of

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stay-put provision, 20 U.S.C. 1415(j), and petitioner's liability for tuition payments. The brief did not address the availability of attorney or expert fees, which were not at issue before the Second Circuit at the merits stage. U.S. Br., *Murphy* v. *Arlington Cent. Sch. Dist. Bd. of Educ.*, 297 F.3d 195 (2d Cir. 2002) (No. 00-7358).

fee-shifting." Pet. App. 9a (quoting *Casey*, 499 U.S. at 87). The court of appeals, however, concluded that Congress intended expert fees to be compensable under IDEA based on a statement in the House Conference Committee Report on IDEA's predecessor, the Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796—namely, that "[t]he conferees intend that the term 'attorneys' fees as part of the costs' include reasonable expenses and fees of expert witnesses and the reasonable costs of any test or evaluation which is found to be necessary for the preparation of the . . . case." Pet. App. 9a (quoting H.R. Conf. Rep. No. 687, 99th Cong., 2d Sess. 5 (1986)). The court of appeals also noted that this Court, in dicta in a footnote in *Casey*, described this statement in the committee report as "an apparent effort to *depart* from ordinary meaning and to define a term of art," and concluded that this Court thereby intended to distinguish IDEA from Section 1988 as construed in *Casey*. *Ibid.* (quoting *Casey*, 499 U.S. at 92 n.5).

The court of appeals also found it "instructive" that after *Casey*, Congress amended Section 1988 to allow recovery of expert fees in civil rights actions, but took no "similar action with respect to the IDEA." Pet. App. 10a. The court "believe[d] it reasonable to infer that Congress, on the basis of the Supreme Court's decision in *Casey*, saw no need to amend the IDEA because the Court had recognized that, in enacting the IDEA, Congress had sufficiently indicated in the Conference Committee Report that prevailing parties could recover expert fees under the Act." *Ibid.* In addition, the court reasoned, awarding expert fees was consistent with IDEA's purpose of ensuring that all children with dis-

abilities obtain a free appropriate public education. *Id.* at 11a-12a.

SUMMARY OF ARGUMENT

The court of appeals erred in concluding that IDEA's fee-shifting provision authorizes an award of expert fees in addition to attorneys' fees.

A. IDEA's fee-shifting provision unambiguously answers the question presented by this case. The provision allows a court, "in its discretion," to "award reasonable attorneys' fees as part of the costs" to the prevailing party parents in an IDEA action. 20 U.S.C. 1415(i)(3)(B). The text nowhere mentions expert fees; rather, it explicitly states that only those fees generated by attorneys are recoverable under IDEA. Furthermore, the term "costs" cannot reasonably be construed to include "expert fees." The costs that can be taxed in the federal court system are statutorily defined in 28 U.S.C. 1920 and do not include general expert fees. The fact that IDEA is Spending Clause legislation also counsels against the court of appeals' reading of the Act, because, as this Court has repeatedly held, Spending Clause legislation may not be interpreted to impose unstated burdens on States that accept the federal monies to which strings are attached.

B. A plain-meaning construction of IDEA's fee-shifting provision is also compelled by this Court's decisions in *Crawford Fitting Co.* v. *J.T. Gibbons, Inc.*, 482 U.S. 437 (1987), and *West Virginia University Hospitals, Inc.* v. *Casey*, 499 U.S. 83 (1991). In *Crawford*, this Court stated that "explicit statutory or contractual authorization" was required to allow a court to tax expenses beyond those listed in 28 U.S.C. 1821 and 1920. *Crawford*, 482 U.S. at 445. In *Casey*, this Court inter-

preted language in 42 U.S.C. 1988 virtually identical to that at issue here and held that neither the use of the phrase "attorney's fee" nor the use of the term "costs" provided the "explicit authorization" necessary to award expert fees to the prevailing party in civil rights litigation. As the Court explained, to hold otherwise would render "dozens of statutes" explicitly referring to *both* "attorney's fees" *and* "expert fees" an "inexplicable exercise in redundancy." *Casey*, 499 U.S. at 92. Because IDEA's fee-shifting language is virtually identical to the language at issue in *Casey*, it follows, *a fortiori*, that IDEA lacks the necessary "explicit statutory authorization" to award expert fees.

C. None of the secondary considerations on which the court of appeals relied provides any basis for departing from the statute's unambiguous text. As this Court has made clear, courts should not resort to committee reports to cloud clear statutory language. See *Lamie* v. *United States Tr.*, 540 U.S. 526, 534 (2004). The Second Circuit was therefore fundamentally mistaken in concluding that a statement in a committee report could trump IDEA's clear and unambiguous text.

Nor does the *Casey* footnote on which the Second Circuit relied call for any different result. That footnote did not endorse any particular reading of IDEA's fee-shifting provision, nor did it endorse the view that IDEA's legislative history could or did provide the requisite "explicit authorization" to award expert fees. It merely cited the committee report as evidence of an "apparent" attempt by some legislators to authorize an award of expert fees. 499 U.S. at 92 n.4. But that effort, while apparent, was unsuccessful. In *Casey* itself, this Court admonished that the "statutory text adopted by both Houses of Congress and submitted to the Presi-

dent" may not be "expanded * * * by the statements of * * * committees during the course of the enactment process." *Id.* at 98-99

Congress's refusal to amend IDEA's fee-shifting provision in the wake of *Casey* also does not support the court of appeals' construction. Congressional inaction provides no more basis to depart from the unambiguous text of IDEA than does a committee report. In any event, if anything, the fact that Congress has not amended IDEA in the wake of *Casey* to authorize the award of expert fees only underscores the conclusion that Congress has not sanctioned such fees. After *Casey*, Congress amended several other civil rights statutes to explicitly authorize the award of expert fees in addition to attorneys' fees. In addition, during this period, Congress amended IDEA—including its fee-shifting provision—multiple times in *other* respects. The legislative record therefore strongly supports the conclusion that Congress does not wish to authorize the award of expert fees in addition to attorneys' fees for IDEA.

The Second Circuit's reliance on the purposes of IDEA to justify its conclusion that expert fees are recoverable is similarly unavailing. Just as a court should not examine legislative history where the statutory language is clear, so too a court should not rely upon policy arguments where the meaning of the statute is plain. That is especially true here. As this Court recently noted in *Schaffer* v. *Weast*, 126 S. Ct. 528, 535 (2005), "Congress has * * * repeatedly amended the [IDEA] in order to reduce its administrative and litigation-related costs." The Second Circuit's decision, however, would *increase* litigation-related costs under IDEA and thus directly contravene Congress's intent.

ARGUMENT

IDEA'S FEE-SHIFTING PROVISION DOES NOT AUTHORIZE AN AWARD OF EXPERT FEES

In *West Virginia University Hospitals, Inc.* v. *Casey*, 499 U.S. 83 (1991), this Court held that expert fees were not authorized by the then-current fee-shifting provision of 42 U.S.C. 1988, which permitted the award of "a reasonable attorneys' fee as part of the costs." 42 U.S.C. 1988(b) (1988). The question presented in this case is whether a virtually identical fee-shifting provision in IDEA permits the award of expert fees. 20 U.S.C. 1415(i)(3)(B) (1997) ("In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents of a child with a disability who is the prevailing party."). The Second Circuit answered that question in the affirmative. As explained below, that decision is contradicted by the text of IDEA, the record of statutory usage concerning fee-shifting provisions, and this Court's decisions, including, most notably, *Casey*.

A. The Plain Meaning Of IDEA's Fee-Shifting Provision Prohibits The Award Of Expert Fees

This Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what its says there." *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992). Accordingly, any construction of 20 U.S.C. 1415(i)(3)(B) "must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *United States* v. *Albertini*, 472 U.S.

675, 680 (1985) (quoting *Park 'N Fly, Inc.* v. *Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985)). When that "language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Lamie* v. *United States Tr.*, 540 U.S. 526, 534 (2004).

The text of IDEA unambiguously authorizes the award of *attorneys'* fees—not expert fees—to parents who prevail in IDEA litigation. Section 1415(i)(3)(B) provides that courts "may award reasonable attorneys' fees as part of the costs." 20 U.S.C. 1415(i)(3)(B). It nowhere mentions "expert fees." That omission is telling. First, at the time IDEA was enacted, "neither statutory nor judicial usage regarded the phrase 'attorney's fees' as embracing fees for experts' services." *Casey*, 499 U.S. at 97. Rather, the phrases "attorneys' fees" and "expert fees" described *different* categories of litigation expenses. Second, as this Court explained in *Casey*, Congress knows how to expressly authorize the award of *both* "attorney's fees" and "expert fees" when it wants to, and has done so in numerous other statutes. See *Casey*, 499 U.S. at 89 (noting that "[a]t least 34 statutes in 10 different titles of the United States Code explicitly shift attorney's fees *and* expert witness fees"); *id.* at 89-90 n.4 (listing statutory provisions). By using the phrase "attorneys' fees" in Section 1415(i)(3)(B), Congress therefore unambiguously directed that only a certain type of fees, namely, those generated by the work of an attorney, would be recoverable in an IDEA action.

That conclusion is bolstered by Section 1415(i)(3)(F)—entitled "Reduction in amount of attorneys' fees"—which directs a court to reduce "the amount of attorneys' fees awarded under this section" whenever

it finds certain specified facts that are explicitly directed to "attorneys" and "legal services." 20 U.S.C. 1415(i)(3)(F). There is no reference to "experts" or "expert services" in the provision, or anywhere else in the statute. If Congress had intended its reference to "attorneys' fees" in Section 1415(i)(3)(B) to authorize the reimbursement of both attorneys' fees and expert fees, there is no reason to believe that Congress would have gone to such great lengths in Section 1415(i)(3)(F) to specify the circumstances in which an award of *attorneys'* fees should be reduced but to have remained silent as to *expert* fees. Indeed, because only attorneys' fees and "legal services" are made subject to reductions under Section 1415(i)(3)(F), the court of appeals' rule would place expert fees in a favored position over the textually-specified attorneys' fees.[3]

Nor does Section 1415(i)(3)(B)'s reference to "costs" provide any support for the court of appeals' conclusion. The term "costs" in Section 1415(i)(3)(B) cannot be interpreted without regard to the immediately preceding phrase "attorneys' fees," and, in any event, "costs" cannot be read to include expert fees. The costs that a judge or clerk of "any court of the United States may tax" are statutorily defined in 28 U.S.C. 1920, and are strictly construed. See *Crawford Fitting Co.* v. *J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987); *Casey*, 499 U.S. at 86-87. The only recoverable costs that could potentially

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[3] Moreover, Congress specifically considered the role of experts in IDEA disputes and provided in Section 1415(b)(1) that parents, regardless of whether they prevail in their challenge to the school's individual education program, may obtain an independent, expert educational evaluation of the child at public expense. 20 U.S.C. 1415(b)(1). That Congress did not further provide for the recovery of other expert fees is strong evidence that no such recovery was intended.

apply to an expert in an IDEA action are found in 28 U.S.C. 1920(3): "Fees and disbursements for printing and witnesses." But those fees are limited to those set out in 28 U.S.C. 1821, *i.e.*, travel expenses and a per diem of $40 for *witnesses*. The expert fees at issue in this case are for *consulting* services, not for appearance as a witness, and were not capped at $40 per diem. Because expert consulting fees are neither attorneys' fees nor costs, they cannot come within IDEA's authorization for recovering "attorneys' fees as part of the costs."[4]

Thus, if Congress intended in IDEA to depart from the statutory meaning of costs in Section 1920 to allow for the recovery of expert fees, it would have either defined costs to include expert and attorneys' fees or stated that "attorneys' fees" *and* "expert fees" could be awarded as part of the costs. Instead, Congress chose to include only the term "attorneys' fees." The plain meaning of IDEA's fee-shifting provision therefore precludes the award of expert fees to the prevailing party in an IDEA action. Congress said that courts could award only "attorneys' fees as part of the costs" in IDEA actions, and the strong presumption is that Congress meant what it said.[5]

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[4] While the difference between expert *consulting* and *testifying* services may affect the availability of costs pursuant to 28 U.S.C. 1821 (insofar as Section 1821 authorizes a $40 per diem for *witnesses*), it does not affect the availability of expert fees under IDEA's fee-shifting provision, which authorizes *no* expert fees.

[5] Courts of appeals have interpreted almost identical language in other statutes to preclude the recovery of expert fees. For instance, various courts have held that the Age Discrimination in Employment Act (ADEA) and the Fair Labor Standards Act of 1938 (FLSA) preclude the recovery of expert fees. See, *e.g.*, *Gray* v. *Phillips Petroleum Co.*, 971 F.2d 591, 592, 594 (10th Cir. 1992) (holding that FLSA's language allowing court to grant "a reasonable attorney's fee

The conclusion that Congress did not intend "attorneys' fees" to include "expert fees" is further buttressed by the settled background principles against which IDEA must be construed. IDEA is Spending Clause legislation that conditions federal financial assistance on compliance with the Act's requirements. See *Schaffer*, 126 S. Ct. at 531-532; *Board of Educ.* v. *Rowley*, 458 U.S. 176, 190 n.11 & 204 n.26 (1982); *Cedar Rapids Cmty. Sch. Dist.* v. *Garret F.*, 526 U.S. 66, 83 (1999) (Thomas, J., joined by Kennedy, J., dissenting) ("[b]ecause IDEA was enacted pursuant to Congress' spending power, our analysis of the statute in this case is governed by special rules of construction") (internal citation omitted). Given this Court's repeated admonition that "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously," *Barnes* v. *Gorman*, 536 U.S. 181, 186 (2002) (quoting *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981)), there would be no basis to hold that, in the face of statutory and regulatory silence, IDEA nevertheless conditions federal funds on the requirement that States may be required to divert money from educational services to pay expert fees in addition to attorneys' fees.

B. This Court's Decisions Compel The Plain-Meaning Construction Of IDEA's Fee-Shifting Provision

A plain-meaning interpretation of the fee-shifting provision is compelled by this Court's decisions in *Crawford* and *Casey*. In *Crawford*, this Court addressed the question of the "power of federal courts to require a

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* * * and costs of the action" did not allow recovery of expert fees); *Tyler* v. *Union Oil Co.*, 304 F.3d 379, 405 (5th Cir. 2002) (ADEA and FLSA); *Bankston* v. *Illinois*, 60 F.3d 1249, 1257 (7th Cir. 1995) (FLSA); *Holland* v. *Valhi, Inc.*, 22 F.3d 968, 979-980 (10th Cir. 1994) (ERISA).

losing party to pay the compensation of the winner's expert witnesses." 482 U.S. at 438. The Court noted that 28 U.S.C. 1920 embodied "Congress' considered choice as to the kinds of expenses that a federal court may tax" and that among the costs that could be taxed were "[f]ees and disbursements for printing and witnesses." 482 U.S. at 440. The witness fee specified in 28 U.S.C. 1920(3) was set out in 28 U.S.C. 1821 and, at that time, limited reimbursement to $30 per day. 482 U.S. at 441. The petitioners argued that Section 1920 did not "preclude taxation of costs above and beyond the items listed, and more particularly, amounts in excess of the § 1821(b) fee." *Ibid.* The Court rejected that view, stating that the petitioners' view would render Section 1920 "superfluous." *Ibid.* It held that "absent explicit statutory or contractual authorization for the taxation of expenses of a litigant's witness as costs, federal courts are bound by the limitations set out in 28 U.S.C. § 1821 and § 1920." *Id.* at 445.

In *Casey*, the Court addressed the virtually identical fee-shifting language in the then-current version of 42 U.S.C. 1988. See 42 U.S.C. 1988 (1988) (authorizing the award of "a reasonable attorney's fee as part of the costs"). The Court explained that Sections 1920 and 1821 "define the full extent of a federal court's power to shift litigation costs absent express statutory authorization to go further." *Casey*, 499 U.S. at 86. Section 1920 is "an express limitation upon the types of costs which, absent other authority, may be shifted by federal courts." 499 U.S. at 87 (citing *Crawford*, *supra*). Because Section 1920 does not authorize "fees for services rendered by an expert employed by a party in a nontestimonial advisory capacity," such fees are not compensable absent "explicit statutory authority." *Ibid.*

And, with respect to testifying expert witnesses, "explicit statutory authority" is necessary to overcome Section 1821's limitation on fees for such experts. *Ibid.* Thus, the Court held, the term "costs" does not include fees for experts who do not testify, nor does it include fees for a testifying expert in excess of those provided by Section 1821. *Id.* at 87 & n.3.

The Court next rejected the notion that the term "attorney's fee" in Section 1988 provides the requisite "explicit statutory authority" for a district court to award both testimonial and nontestimonial expert fees. *Casey*, 499 U.S. at 87. The Court explained that "[t]he record of statutory usage demonstrates convincingly that attorney's fees and expert fees are regarded as separate elements of litigation cost." *Id.* at 88. If "attorney's fees" included expert fees, the Court reasoned, then "dozens of statutes referring to the two separately become an inexplicable exercise in redundancy." *Id.* at 92. In addition, when Congress enacted Section 1988, court cases showed that expert fees were not considered an element of attorneys' fees. *Ibid.* The Court also rejected petitioner's reliance on legislative history, and emphasized that where the statutory text "contains a phrase that is unambiguous—that has a clearly accepted meaning in both legislative and judicial practice—we do not permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process." *Id.* at 98-99.

Because the key language in IDEA's fee-shifting provision ("attorneys' fees as part of the costs") is identical to the statutory language at issue in *Casey*, *Casey* compels the conclusion that IDEA's fee-shifting provision does not authorize reimbursement for expert fees. See *Goldring* v. *District of Columbia*, 416 F.3d 70, 73

(D.C. Cir. 2005) ("[t]he correct decision does not seem to us to be difficult to reach, for the Supreme Court has stated in fairly unequivocal terms that language nearly identical to that used in section 1415 is unambiguous and, more to the point, does not allow a prevailing party to shift his expert fees"); *T.D.* v. *LaGrange Sch. Dist. No. 102*, 349 F.3d 469, 482 (7th Cir. 2003) (finding that IDEA fee-shifting provision does not authorize award of expert witness fees, "particularly, in light of the fact that the Supreme Court in *Casey* found that the same words used in the former § 1988 ('reasonable attorney's fee as part of costs') did not provide the necessary explicit statutory authorization"); *Neosho R-V Sch. Dist.* v. *Clark*, 315 F.3d 1022, 1032-1033 (8th Cir. 2003) (noting that *Casey* "specifically indicated that the term 'costs' should be construed narrowly as not including expert witness fees").

C. The Court Of Appeals Erred In Rejecting The Plain Reading Of IDEA's Fee-Shifting Provision

In concluding that IDEA nevertheless authorizes the award of expert fees, the Second Circuit relied on legislative history, congressional inaction, and its view of the general purposes of IDEA. None of those secondary considerations, however, provides any basis for disregarding the plain meaning of the statute and clear import of this Court's decisions.

1. As noted above, a conference committee report accompanying the 1986 statute that added IDEA's fee-shifting provision stated that "[t]he conferees intend that the term 'attorneys' fees as part of the costs' include reasonable expenses and fees of expert witnesses and the reasonable costs of any test or evaluation which is found to be necessary for the preparation of the

* * * case." H.R. Conf. Rep. No. 687, 99th Cong., 2d Sess. 5 (1986). The Second Circuit concluded that this legislative history compelled the conclusion that IDEA's fee-shifting provision authorized the award of expert fees as well as attorneys' fees. For several reasons, the court's reliance on that legislative history was seriously misplaced.

Most fundamentally, recourse to legislative history to determine whether Congress intended to shift expert fees in IDEA "is simply unwarranted," *Goldring*, 416 F.3d at 74, because, as the Court held in *Casey*, the relevant text, "attorneys' fees as part of the costs," is clear and unambiguous. See *ibid.*; *LaGrange*, 349 F.3d at 483; *Neosho*, 315 F.3d at 1032. Courts should "not resort to legislative history to cloud a statutory text that is clear." *Ratzlaf* v. *United States*, 510 U.S. 135, 147-148 (1994). "Legislative history" is simply "irrelevant to the interpretation of an unambiguous statute." *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 809 n.3 (1989). And "appeals to statutory history are well taken only to resolve 'statutory ambiguity.'" *Barnhill* v. *Johnson*, 503 U.S. 393, 401 (1992). Because the statutory provision at issue here is not ambiguous, the Second Circuit erred in resorting to legislative history to depart from the plain meaning of the text that Congress enacted.[6]

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[6] In *Casey*, this Court emphatically rejected a similar attempt to expand the meaning of the phrase "reasonable attorneys' fee as part of costs" by resort to a House Committee Report. As the Court observed, the "best evidence" of Congress's intent is "the statutory text adopted by both Houses of Congress and submitted to the President," and where, as here, that statutory language "has a clearly accepted meaning in both legislative and judicial practice," it cannot "be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process." 499 U.S. at 98-99.

Moreover, as the District of Columbia, Seventh, and Eighth Circuits have all properly concluded, the fact that this Court referred to the above-mentioned committee report in a footnote in *Casey* does not justify the Second Circuit's reading of IDEA's fee-shifting provision. In that footnote, the Court responded in dicta to the argument that the committee report informed the proper construction of the phrase "attorney's fees" by stating that the report represented "an apparent effort to *depart* from ordinary meaning and to define a term of art." 499 U.S. at 92 n.5. The Court in no way opined that the effort was a successful one. Rather, other language in *Casey* affirms that the Court does "not permit [unambiguous statutory text] to be expanded or contracted by the statements of * * * committees during the course of the enactment process." *Id.* at 98-99. And, therefore, most courts reading *Casey* as a whole have concluded that "this 'apparent effort' to define a term of art in legislative history is an unsuccessful one." *Neosho*, 315 F.3d at 1032; accord *LaGrange*, 349 F.3d at 482; *Goldring*, 416 F.3d at 75. The bottom line remains that a statement in a committee report simply does not constitute the type of "explicit authority" required to allow an award of expert fees beyond the limitations of the general cost statutes. *Casey*, 499 U.S. at 86-87; *Neosho*, 315 F.3d at 1031.

The Second Circuit's effort to attach significance to the fact that Justice Scalia was the author of the *Casey* decision is also without merit. Pet. App. 10a-11a. The majority opinion in *Casey* was written for the Court, not a single Justice. Nothing in the footnote indicates that the Court considered the committee report's "apparent effort" to supplement the statutory text to have been a *successful* effort. To the contrary, the Court in *Casey*

made clear that it is improper even to look to legislative history where, as there and here, a statutory term is unambiguous. See 499 U.S. at 99-100. This case involves precisely the same statutory terms and therefore calls for the same result.[7]

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[7] In any event, IDEA's legislative history is itself far more ambiguous than the Second Circuit recognized. First, the House Conference Committee Report at issue states that "[t]he conferees intend that the term 'attorneys' fees as part of the costs' include reasonable expenses and fees of expert *witnesses* and the reasonable costs of any test or evaluation which is found to be necessary for the preparation of the * * * case." H.R. Conf. Rep. No. 687, 99th Cong., 2d Sess. 5 (1986) (emphasis added). Even if that report could somehow overcome the plain meaning of the statutory text, it appears to relate only to the services of expert *witnesses*, not expert consulting services of the type at issue here. Second, it appears that a primary aim in enacting the fee-shifting provision was responding to this Court's decision in *Smith* v. *Robinson*, 468 U.S. 992 (1984), which had held that prevailing parents could not recover *attorneys'* fees under the Education of the Handicapped Act or other civil rights statutes. See 132 Cong. Rec. 17,600 (1986) (statement of Rep. Beilenson) (noting that the section would "overturn the decision of the Supreme Court in the case of Smith versus Robinson," which had "rendered courts unable to award attorneys' fees to families who sue school districts which fail to provide appropriate educational opportunities for handicapped children"). The *Smith* case involved a claim for attorneys' fees and did not address the availability of expert fees. Third, in contrast to the committee report relied on by the court of appeals, there are numerous other statements in the legislative history that support the plain meaning of "attorneys' fees." See, *e.g.*, *ibid.* (statement of Rep. Beilenson) (stating that the Handicapped Children's Protection Act of 1986 (HCPA) "would restore the authority of courts to award fees for the services of attorneys—in addition to other costs awarded"); *ibid.* (statement of Rep. Quillen) (stating that the HCPA "authorize[s] the award of reasonable attorney fees to prevailing parties"); 132 Cong. Rec. at 16,823 (statement of Sen. Weicker) (stating that the HCPA allowed "the courts to award attorneys' fees to prevailing parents"); *id.* at 16,825 (statement of Sen. Hatch) (stating that HCPA "provides for the award of reasonable

2. The Second Circuit's reliance on Congress's inaction in the wake of *Casey* is similarly misplaced. The Second Circuit concluded that it was "reasonable to infer that Congress, on the basis of the Supreme Court's decision in *Casey*, saw no need to amend the IDEA because the Court had recognized that, in enacting the IDEA, Congress had sufficiently indicated in the Conference Committee Report that prevailing parties could recover expert fees under the Act." Pet. App. 10a. The court therefore found it "instructive" that Congress amended Section 1988 and Title VII in response to the *Casey* decision in order to make expert fees compensable in civil rights actions, but "took no similar action with respect to the IDEA." *Ibid.* Congress's inaction provides no more authority to override unambiguous statutory text than does affirmative legislative history. In fact, it provides less. See *Department of the Interior* v. *Klamath Water Users Protective Ass'n*, 532 U.S. 1, 16 n.7 (2001) (noting that "as a general rule we are hesitant to construe statutes in light of legislative inaction"); *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 186-187 (1994) (warning against reliance on legislative inaction). And, in any event, the Second Circuit drew the *wrong* conclusion from the inaction on which it focused.

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attorney's fees to prevailing parents"). If, in fact, Congress intended to deviate from normal usage and somehow expand the meaning of the phrase "attorneys' fees as part of the costs" to include expert fees, then it would be reasonable to expect these legislators to comment on that deviation. At most, this history reflects the very sort of imprecision and contradiction that gives rise to the settled rule that where statutory language is clear, legislative history provides no basis for overriding that text.

As the District of Columbia Circuit pointed out in *Goldring*, it is far more reasonable to infer from Congress's refusal to amend IDEA's fee-shifting provision following *Casey* that "Congress had no intention of allowing recovery of expert fees under the IDEA." 416 F.3d at 76. This is so because (1) at most, *Casey* stated that the committee report was only an "apparent effort" by the congressional committee to depart from the ordinary meaning of the statutory phrase "attorneys' fees as part of the costs"; (2) *Casey* did not include IDEA as an example of a statute that authorizes the shifting of both attorneys' fees and expert fees; and (3) "the version of section 1988 construed in *Casey* is nearly identical to section 1415." *Ibid.*

Moreover, in addition to Section 1988 and Title VII, Congress—in response to this Court's decision in *Casey*—has expressly authorized the award of expert fees (in addition to attorneys' fees) in the Family and Medical Leave Act of 1993, 29 U.S.C. 2617, see H.R. Rep. No. 8(i), 103d Cong., 1st Sess. 48 (1993), and Freedom of Access to Clinic Entrances Act of 1994 (FACE), 18 U.S.C. 248, see H.R. Rep. No. 488, 103d Cong., 2d Sess. 10 (1994). Congress amended IDEA's attorneys' fee provision in 1990 and 2004, but made no effort to include language authorizing expert fees under IDEA. These provisions provide further proof, if any were needed, that Congress knows how to authorize the award of expert fees to a prevailing party when it desires to do so. Accordingly, if any inference can be drawn from the fact that Congress has not amended IDEA in the wake of *Casey* to authorize awards for ex-

pert fees, it is that Congress does not wish to sanction such fee awards.[8]

3. The Second Circuit's reliance on IDEA's purpose of ensuring that all children with disabilities obtain a free appropriate public education is also misplaced. Pet. App. 11a-12a. As the District of Columbia Circuit explained, where, as here, the language of the statute is clear, such policy arguments are insufficient to overcome the express intent of Congress. *Goldring*, 416 F.3d at 76-77; see *Buckhannon Bd. & Care Home, Inc.* v. *West Va. Dep't of Health & Human Res.*, 532 U.S. 598, 610 (2001) (holding that "[t]o disregard the clear legislative language and the holdings of our prior cases on the basis of * * * policy arguments would be" un-

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[8] To the extent the Court is inclined to go down the path of drawing inferences from congressional inaction, it must also account for the fact that Congress, in 2004, considered but did not adopt a bill (the Fairness and Individual Rights Necessary to Ensure a Stronger Society: Civil Rights Act of 2004) that would have amended IDEA and numerous other civil rights statutes to authorize an award of expert fees explicitly. See S. 2088, 108th Cong., 2d Sess. (2004); H.R. 3809, 108th Cong., 2d Sess. (2004). The bill explained that its purpose was, *inter alia*, "to allow recovery of expert fees by prevailing parties under civil rights fee-shifting statutes," and that this purpose was "made necessary by the decision of the Supreme Court in [*Casey*]." See S. 2088, *supra*, §§ 521, 522(1). Specifically, it would have provided that "Section 615(i)(3)(B) of the Individuals with Disabilities Education Act (20 U.S.C. 1415(i)(3)(B)) is amended by inserting '(including expert fees)' after 'attorney's fees.'" S. 2088, *supra*, § 523(e). If, as the Second Circuit posited below, Congress already allowed for the recovery of expert fees under IDEA's fee-shifting provision, then Congress would have had no need to include IDEA among the civil rights statutes to be amended by the bill. That bill expired at the end of the 108th Congress. Congress remains free to address this issue as it sees fit, but this Court should hold that IDEA, as currently written, does not allow for the award of expert fees.

warranted). In *Casey*, this Court rejected a similar argument "that the [remedial] purpose in enacting § 1988 must prevail over the ordinary meaning of the statutory terms." 499 U.S. at 98. As the Court put it, "Congress could easily have shifted 'attorney's fees and expert witness fees,' or 'reasonable litigation expenses,' as it did in contemporaneous statutes; it chose instead to enact more restrictive language, and we are bound by that language." *Id.* at 99. That conclusion is equally true here.

Indeed, in recently holding that parents who initiate due process hearings under IDEA bear the burden of proving their claims, this Court emphasized that "the touchstone of our inquiry is, of course, the statute," and found no reason to depart from the ordinary rule that the burden of proof falls on the party seeking relief. *Schaffer*, 126 S. Ct. at 534. So too, there is no reason to depart from ordinary rules of statutory interpretation here. That is particularly true given that one of the goals of IDEA, and a key objective of the 2004 Amendments to IDEA, is to reduce the litigation costs for schools under the Act so that funding could be dedicated to the delivery of educational services. See *id.* at 535 (discussing the Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647). Holding that the Act authorizes the award of expert fees would have precisely the opposite effect.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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Supreme Court, U.S.
FILED
FEB 21 2006
OFFICE OF THE CLERK

No. 05-18

IN THE

Supreme Court of the United States

ARLINGTON CENTRAL SCHOOL DISTRICT
BOARD OF EDUCATION,

Petitioner,

v.

PEARL MURPHY and THEODORE MURPHY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

DAVID C. VLADECK*
INSTITUTE FOR
PUBLIC REPRESENTATION
GEORGETOWN UNIVERSITY
LAW CENTER
Attorney for Respondents
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RAYMOND G. KUNTZ*
JEFFREY J. SCHIRO
KUNTZ, SPAGNUOLO,
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Attorneys for Petitioner
444 Old Post Road
Bedford Village, NY 10506
(914) 234-6363

* *Counsel of Record*

PETITION FOR CERTIORARI FILED JUNE 27, 2005
CERTIORARI GRANTED JANUARY 6, 2006

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APPENDIX A — RELEVANT DOCKET ENTRIES OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

US COURT OF APPEALS FOR THE SECOND CIRCUIT

INDIV

CLOSED

Court of Appeals Docket #: 03-7850-cv
Nsuit: 3890 STATUTES-Other

Murphy v. Arlington Central

Filed 8/21/03

Appeal SDNY (NEW YORK CITY)
from:

Case type information:

Lower court information:

District: 99-cv-9294

Trial Judge: Charles S. Haight

MagJudge:

Date Filed: 08/30/99

Date order/judgement: 7/23/2003

Date NOA filed: 8/20/2003

Appendix A

Fee status: Paid

Panel Assignment:

Panel: JON RSP RAK

Date of decision: 3/29/05

Prior cases: NONE

Current cases NONE

Official Caption 1/

INDIV

CLOSED

Docket No. [s]: 03-7850

PEARL MURPHY, THEODORE MURPHY,

Plaintiffs - Appellees,

v.

ARLINGTON CENTRAL SCHOOL DISTRICT
BOARD OF EDUCATION,

Defendant - Appellant.

Appendix A

Authorized Abbreviated Caption 2/

Docket No. [s]: 03-7850

MURPHY V. ARLINGTON CENTRAL

1/ Fed. R. App. P. Rule 12 [a] and 32 [a].

2/ For use on correspondence and motions only.

Docket as of February 02, 2006 7:48 pm

INDIV

CLOSED

Public Citizen, Inc. Movant	David C. Vladeck Esq. [LD ret] Georgetown University Law, Center 600 New Jersey Ave. Center Washington , DC , 20001 202-662-9540
Arlington Central	Jeffrey J. Schiro Esq.
Defendant-Appellant	[ret] Law Office of Raymond G. Kuntz 444 Old Post Rd Bedford Village , NY , 10506 914-234-6363

Appendix A

Pearl Murphy	Pearl Murphy
Plaintiff-Appellee	n/a
	142 Reilly Rd. LaGrangeville , NY , 12540 914-223-3849
Arlington Central	Raymond G. Kuntz Esq.
Defendant-Appellant	[ret] Law Office of, Raymond G. Kuntz, Esq. 444 Old Post Rd Bedford Village , NY , 10506 914-234-6363

Docket as of February 02, 2006 7:48 pm

INDIV

CLOSED

Theodore Murphy	Theodore Murphy
Plaintiff-Appellee	n/a
	142 Reilly Rd. LaGrangeville , NY , 12540 914-223-3849

Appendix A

Docket as of February 02, 2006 7:48 pm

INDIV

CLOSED

8/21/03 Copy of notice of appeal and district court docket entries on behalf of Appellant Arlington Central filed. [03-7850] [DT]

8/21/03 Note: This appeal was PRO SE when filed. [DT]

* * *

8/21/03 Copy of district court memorandum & order dated 7/22/03, endorsed by Hon. Charles S. Haight, Sr. USDJ, RECEIVED. [03-7850] [DT]

* * *

4/26/04 Scheduling order #1 filed. Appellants brief due 5/26/2004. Appellees brief due 6/25/2004. Ready week 8/6/2004. Record on appeal due 5/6/2004. [EA]

4/26/04 Notice to counsel and pro se re: Scheduling order dated 4/26/04. [EA]

Appendix A

Docket as of February 02, 2006 7:48 pm

INDIV

CLOSED

5/6/04	Record on appeal index and clerk's certificate in lieu of record received. [EA]
	* * *
5/26/04	APPELLANT Arlington Central School District, brief FILED with proof of service. [EA]
5/26/04	APPELLANT Arlington Central School District, appendix filed w/pfs. [EA]
6/22/04	APPELLEE Pearl Murphy, Theodore Murphy, LETTER BRIEF filed with proof of service. [EA]
7/7/04	Public Citizen, Inc., amicus brief received. [EA]
7/8/04	Movant Public Citizen, Inc. motion participate and file brief as amicus curiae filed with proof of service. [EA]
7/13/04	Appellant Arlington Central motion extended time to file reply brief to July 23, 2004 filed with proof of service. [EA]

Appendix A

7/19/04	Order FILED REFERRING motion participate as amicus curiae by Movant Public Citizen, Inc., "to the merits panel." Endorsed by AMH on motion dated 7/13/2004. [EA]
	* * *
7/20/04	Order FILED GRANTING motion extended time to file reply brief until "July 23, 2004" by Appellant Arlington Central, endorsed by CJM on motion dated 7/13/2004. [EA]
7/23/04	APPELLANT Arlington Central School District Board of Education, reply brief filed with proof of service. [EA]
	* * *
10/22/04	Set for argument on December 16, 2004 B

Appendix A

Docket as of February 02, 2006 7:48 pm

INDIV

CLOSED

Panel [JC]

10/29/04 Public Citizen amicus brief filed with proof of service. [JC]

10/29/04 Order FILED GRANTING motion to file amicus brief by Movant Public Citizen, Inc., endorsed on motion dated 7/13/2004 [JC]

11/2/04 Notice to counsel in re: Order dated 10/29/04. [JC]

11/3/04 Movant Public Citizen, Inc. motion to participate in oral argument filed with proof of service. [EA]

11/12/04 Record on appeal after index filed. (1 vol) [VM]

11/17/04 Order FILED GRANTING motion for leave for Amicus Curiae to participate in oral argument by Movant Public Citizen, Inc., endorsed on motion dated 11/3/2004(FOR THE COURT-AV). [AV]

11/18/04 Notice to counsel in re:order granting motion for leave for amicus curiae to participate in oral argument. [AV]

Appendix A

12/7/04 MOVANT Public Citizen, Inc., 28(J) letter FILED. [EA]

12/16/04 Case heard before NEWMAN, POOLER, KATZMANN, C.JJ. [JC]

3/29/05 Judgment of the district court is AFFIRMED by published signed opinion filed. (RAK) [EA]

3/29/05 Notice to counsel and pro se re: Opinion dated 3/29/05. [EA]

3/29/05 Judgment filed. [EA]

* * *

Docket as of February 02, 2006 7:48 pm

INDIV

CLOSED

4/15/05 Amended published signed opinion filed. (RAK) [EA]

4/15/05 Notice to counsel and pro se re: Amended opinion dated 4/15/05. [EA]

4/15/05 AMENDED judgment filed [EA]

* * *

Appendix A

5/31/05	Judgment MANDATE ISSUED. CLOSED [EA]
5/31/05	Notice to counsel and pro se re: Mandate issued on 5/31/05. [EA]
6/6/05	Acco received in records room from team. Number of Volumes: 1 [CK]
7/11/05	Notice of filing petition dated 6/27/05 filed. Supreme Court #: 05-18. [PI]
1/24/06	Writ of Certiorari GRANTED: the petition for writ of certiorari is granted limited to Question one presented by the petition. [AC]

APPENDIX B — RELEVANT DOCKET ENTRIES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK (FOLEY SQUARE)

U.S. District Court
Southern District of New York (Foley Square)
CIVIL DOCKET FOR CASE #: 1:99-cv-09294-CSH

Murphy, et al v. Arlington Central Bd
Assigned to: Judge Charles S. Haight
Demand: $0
Case in other court: USDC-NDNY, 99-cv-1258(TJM)
Cause: 20:1400 Civil Rights of Handicapped Child

Date Filed: 08/30/1999
Jury Demand: None
Nature of Suit: 890 Other
Statutory Actions
Jurisdiction: Federal Question

Plaintiff

Pearl Murphy
represented by **Pearl Murphy**
Reilly Road
Box 27
LaGrangeville, NY 12540
(914) 223-3849 PRO SE

Appendix B

Plaintiff

Theodore Murphy
represented by **Theodore Murphy**
Reilly Road
Box 27
LaGrangeville, NY 12540
(914) 223-3849 PRO SE

V.

Defendant

Arlington Central School District
Board of Education
represented by **Raymond G. Kuntz**
P.O. Box 396
Route 22
Hunting Ridge Mall, Suite 214
Bedford Village, NY 10506
(914) 234-6363 *LEAD ATTORNEY*

Appendix B

Date Filed	#	Docket Text
		* * *
01/22/2003	21	Memo-Endorsement on letter addressed to Judge Haight from Teddy Murphy, dated 01/13/03; Counsel is granted an additional month or February 13, 2003 for submission of certification and itemized bill regarding fees for Marilyn Arons ; (signed by Judge Charles S. Haight); (djc) (Entered: 01/24/2003)
02/19/2003	22	MEMORANDUM AND ORDER; that Arlington is directed to file and serve papers responding to plaintiff's claims on or before 3/7/03. If they wish to do so, plaintiffs may file and serve reply papers on or before 3/21/03. The Court will then regard the case as submitted for decision . (signed by Judge Charles S. Haight); (pl) (Entered: 02/25/2003)
03/12/2003	23	MEMORANDUM OF LAW by Arlington Central Bd. (sac) (Entered: 03/19/2003)
03/12/2003	24	AFFIDAVIT of Barbara J. Donegan by Arlington Central Bd in opposition to Pltffs' application for fees and costs. (sac) (Entered: 03/19/2003)

Appendix B

05/08/2003		Record on appeal files (00-7358) returned from U.S. Court of Appeals: [17-1] appeal by Arlington Central Bd (pr) (Entered: 05/08/2003)
07/23/2003	25	MEMORANDUM OPINION AND ORDER #88796, for the reasons stated, plaintiffs Pearl Murphy and Theodore Murphy are entitled to recover from defendant Arlington Central School Board of Education the sum of $8,650. The balance of plaintiffs' application for fees and costs in this action is denied. If the District does not pay this amount promptly, plaintiffs may ask this Court in writing (with a copy to counsel for the District) to enter judgment of this amount, so that post-judgment interest will begin to accrue. There is no occasion to consider pre-judgment interest, because plaintiffs are not out of pocket with respect to the allowed amount . (signed by Judge Charles S. Haight); (kw) Modified on 07/25/2003 (Entered: 07/25/2003)
08/20/2003	26	NOTICE OF APPEAL by Arlington Central Bd from [25-1] order for the reasons stated, plaintiffs Pearl Murphy and Theodore Murphy are entitled to recover from defendant Arlington Central School Board of Education the

		sum of $8,650. The balance of plaintiffs' application for fees and costs in this action is denied. If the District does not pay this amount promptly, plaintiffs may ask this Court in writing (with a copy to counsel for the District) to enter judgment of this amount, so that post-judgment interest will begin to accrue. There is no occasion to consider pre-judgment interest, because plaintiffs are not out of pocket with respect to the allowed amount . Copies of notice of appeal mailed to Attorney(s) of Record: Theodore Murphy and Pearl Murphy. $105.00 Appeal filing fee paid 8/20/03 on receipt # E 482618. (dt) (Entered: 08/20/2003)
08/20/2003		Notice of appeal and certified copy of docket to USCA: [26-1] appeal by Arlington Central Bd ; Copy of notice of appeal sent to District Judge. (dt) (Entered: 08/20/2003)
08/22/2003	27	NOTICE OF MOTION (filed on service date) by Arlington Central Bd for an order purs. to Rule 62(d) of the FRCP, granting defendant a stay of the Court's Memorandum Opinion and Order pending appeal, entered on the 23rd day of July, 2003 . Return Date 9/17/03 at 9:00. Affidavit of Barbara J. Donegan attached. (sb) (Entered: 09/03/2003)

Appendix B

09/02/2003	29	MEMORANDUM; that the Court will not consider dft's moiton for a stay until the record demonstates that proper security (for a Bond) has been lodged with the Clerk . (signed by Judge Charles S. Haight); (pl) (Entered: 09/05/2003)
09/04/2003	28	Notice that the record on appeal has been certified and transmitted to the U.S. Court of Appeals: [26-1] appeal by Arlington Central Bd. (dt) (Entered: 09/04/2003)
11/07/2003	30	BOND #CGB8720369, in the sum of $ 9,602.00 entered by Arlington Central Bd. (tp) (Entered: 11/17/2003)
11/17/2003	31	Memo-Endorsement on letter addressed to Judgement & Orders Clerk from Jeffrey J. Schiro, dated 11/5/03. Re: the District requests that, after your examination, that you approve and endorse the bond; the supersedeas bond endorsed with this letter is approved by the Court . (signed by Judge Charles S. Haight); (pl) (Entered: 11/18/2003)
05/06/2004	32	Appeal Record Sent to USCA (Index). Notice that the Original index to the record on Appeal for [26] Notice of Appeal,,, filed by Arlington Central

Appendix B

		School District Board of Education USCA Case Number 03-7850-cv, 3 Copies of the index, Certified Clerk Certificate and Certified Docket Sheet were transmitted to the U.S. Court of Appeals. (dt,) (Entered: 05/06/2004)
11/09/2004		Appeal Record Sent to USCA (File). Indexed record on Appeal Files for [26] Notice of Appeal, filed by Arlington Central School District Board of Education USCA Case Number 04-5571, were transmitted to the U.S. Court of Appeals to the attention of Vincenza Mathias. (tp,) (Entered: 11/09/2004)
06/03/2005	33	MANDATE of USCA (Certified Copy) as to [26] Notice of Appeal,,, filed by Arlington Central School District Board of Education, USCA Case Number 03-7850-cv. Ordered, Adjudged and Decreed that the order of the District Court is AFFIRMED. MACKECHNIE, Clerk USCA. Issued As Mandate: 5/31/05. (pr,) (Entered: 06/09/2005)
10/03/2005	34	ORDER that the motion by dft for a stay pending appeal is denied as moot, the court of appeals having issued its decision and mandate. (Signed by Judge Charles S. Haight on 9/30/05) (dle,) (Entered: 10/04/2005)

APPENDIX C — LETTER FROM PEARL AND THEODORE MURPHY REQUESTING ORDER THAT ARLINGTON CENTRAL SCHOOL DISTRICT PAY FOR CONSULTATION SERVICES OF MARILYN ARONS INCURRED BY PLAINTIFFS

Pearl and Teddy Murphy
142 Reilly Road
Lagrangeville, N.Y. 12540

January 13, 2003

Honorable Judge Haight, Jr.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

99 Civ.9294

RE: Murphy v. Arlington
RE: prevailing party fees

Dear Judge Haight,

As per your order regarding the fees for Marilyn Arons, please find her cover letter to me her certification and attached itemized bill. I am also forwarding this simultaneously to Jeffrey Schiro, esq.

I have attempted to calculate my husband and my out of pocket expenses pertaining to travel over the last four years of litigation. Because of the Christmas holidays and the continued needs of my son, I have been unable to complete and verify all mileage. Therefore I request an additional month or February 13, 2003 for me to submit this final piece of information. Thank you for your consideration.

Appendix C

Sincerely,

s/ Pearl Murphy
Pearl Murphy
s/ Teddy Murphy
Teddy Murphy

CC: Jeffrey Schiro, esq.
CC: File

Appendix C

Marilyn Arons, M.S.
210 Carlton Terrace
Teaneck, New Jersey 07666
201-692-3613

December 20, 2002

MEMORANDUM

TO: PEARL MURPHY
FROM: MARILYN ARONS
RE: FEE FOR SERVICE

As per your request, please find a complete bill for the consultation services provided to Joe. If there are any questions about its contents, do not hesitate to contact me. In addition, I have also included a Certification. This assures that the bill is accurate to the best of my ability, and that I am not charging for any legal services provided.

Appendix C

CERTIFICATION

I, Marilyn Arons, being of full age, do hereby certify that the following statements are true to the best of my ability. I am aware that if any of these statements are knowingly false, I am subject to punishment.

1. I am the Marilyn Arons who is referenced within *R.C. v. Borough of Palmyra Bd. Of Education*, 97-6119; (D.N.J. 1999; 31 IDELR 3). My established market value is $200 per hour.

2. I am the Marilyn Arons who is referenced within *Connors v. Mills*, 34 F. Supp. 2d 795; (N.D.N.Y. 1998). The attached bill for Joseph Murphy was made in accordance to my understanding of those areas for which the Second Circuit permits me to bill for services.

3. I was asked by Pearl Murphy to help her son receive an appropriate education in October of 1997. She explained her financial circumstances and the issues in her son's case as she understood them. She originally asked that I serve as an educational consultant in order to have an IEP developed in accordance with his needs. Because of the unusual nature of this case, as well as the fragile state of her sons development, I agreed to take the case on a contingency. A verbal contract was agreed upon in which the family agreed to seek my fees from the Arlington School District or a court of competent jurisdiction in the event there was litigation and the

family became the prevailing party. I have never received payment for any services provided since 1997. I have stayed with the case because of my concern for the social, emotional, academic and developmental welfare of Joseph, a child I deemed to be at significant risk without appropriate intervention.

s/ Marilyn Arons
Marilyn Arons, M.S.

Date: December 20, 2002

Appendix C

JOSEPH MURPHY CONSULTATION BILL
(By School Year)

Hourly Rate: $200

School Year 1997-1998

DATE	SERVICE	HOURS
11/1/97	Parent consultation, updated school history, record review	3
11/2/97	Development of current educational status/goals for IEP meeting	4
11/5/97	Attendance/participation at CSE meeting	5
12/3/97	Preparation for/attendance/ participational CSE meeting	3
1/8/98	Parent consultation re: placement of Joe at Kildonan	2
7/28/98	Parent consultation/development of parent input for Annual Review	1 1/2
8/23/98	Record review	1
8/24/98	Development of written summary of program issues for parent	2

Subtotal: 21 1/2 hours
Fee: $4,300

Appendix C

School Year 1998-1999

DATE	SERVICE	HOURS
9/23/98	Record review analysis for patterns of functioning	4 1/2
10/11/98	Review of Kildonan progress reports	1/2
10/21/98	Development of Petitioners Index	3
10/22/98	Parent conference	1
10/26/98	Review of Costello records/ Development of Costello questions	3
10/28/98	Parent Consultation re: Executive functioning	2
11/1/98	Record review re: Joes social, emotional development; review formal testing measures	3
11/8/98	Review of "When is a Language Disability not a Language Disability", Brooks/ Comparison of article to Joes language evaluations	4
11/9/98	Review of IEP meeting tapes/parent notes from IEP meetings	3 1/2

Appendix C

DATE	SERVICE	HOURS
11/17/98	Development of questions for Jennifer Jenson; Review of Ansley report and recommendations; Development of Ansley questions	5
12/9/98	Parent consultation re: impact of Arlington on Joe's self-image	1
3/20/99	Review of Brooks Follow-up note	1/2
4/8/99	Development of Brooks questions	1
4/10/99	Review of Brooks FAX note	1/4
4/11/99	Response to Brooks note	1/4
5/12/99	Development of Pearl Murphy questions	1 1/2
5/25/99	Review of Kildonan records; Development of Schantz questions	2
7/14/99	Parent conference/recommendations for 99-00 program	2
7/27/99	Review of Schepperly to Murphy letter; parent consultation	1
8/11/99	Parent Conference re: CSE meeting date	1/4

Appendix C

DATE	SERVICE	HOURS
8/23/99	Parent conference; development Annual Review of agenda	1
	Subtotal:	40 1/4
	Fee:	$8,050

School Year 1999-2000

9/4/99	Review/analysis of proposed 99-00 IEP; review of WIAT testing/ St. Francis speech-language evaluation	3
3/29/00	Review of school records	3
4/2/00	Development of Schepperly questions	4
4/4/00	Development of Levinsky questions	1 1/2
4/7/00	Parent conference re: Kildonan	1/2
5/6/00	Parent conference re: Joes return to Arlington	1
6/24/00	Parent conference; explanation of traumatic brain injury	1
6/25/00	Review of parent agenda for CSE meeting	1/2

Appendix C

DATE	SERVICE	HOURS
8/21/00	Parent conference re: IEP meeting/ Joes transition to Arlington	1/2
8/27/00	Parent conference re: return to Arlington	1/4
8/28/00	Review of parent FAX; parent conference re: supports needed at Arlington	1
8/29/00	Review of parent FAX; parent/student conference	1 1/2
	Subtotal:	17 3/4
	Fee:	$3,550

2000-2001 School Year

9/6/00	Parent/student conference re: home instruction; review of parent FAX, Donegan letters	2
9/9/00	Review of Costello letter/00-01 IEP, comparison to 99-00 IEP	3
9/10/00	Preparation of 9/11-15/00 lesson plans for Joe	3

Appendix C

DATE	SERVICE	HOURS
9/13/00	Review student FAX; student conference re: homework	1
9/17/00	Site visit to monitor lessons, review Joes work	1 1 /2
9/18/00	Review/correct assignment; Student conference; development of 9/18-22/00 lesson plans	3
9/22/00	Review of neurological update	1/2
10/15/00	Review parent FAX; parent conference	1/2
10/17/00	Review parent FAX, revised IEP, Donegan letter, Murphy to Donegan letter	1
10/22/00	Review Murphy to Donegan letter; Parent conference	1 1/2
12/19/00	Review of Donegan letters; Parent conference	1
12/27/00	Review of Hartwig neuropsychological; Comparison to prior neuropsychological	3

Appendix C

DATE	SERVICE	HOURS
12/28/00	Parent conference re: Joe's educational status	1/2
1/18/01	Home visit; accompanying Joe to Duchess Community College; Consultation as to courses	6
1/22/01	Parent consultation re: necessary transition elements for Joe; review of 1/22/01 Murphy letter	1 1/2
1/28/01	Review of parent FAX; development of parent agenda for CSE meeting	2
1/29/01	Review of parent FAX, parent/ student consultation re: CSE meeting	1/2
3/08/01	Review of WIAT testing/Donegan letters; parent conference	1
3/16/01	Review of CSE minutes	1/4
3/20/01	Parent/student consultation re: opinions on Joe's progress	1/2
5/4/01	Review of Healey neuropsychological	2

Appendix C

DATE	SERVICE	HOURS
5/5/01	Parent consultation re: Annual Review	1/2
5/18/01	Updated record review	2
5/22/01	Parent consultation re: credits for graduation; Joe's future	1 1/2
6/6/01	Parent consultation; development of CSE agenda	1/2
6/15/01	Parent consultation re: Joe's transition needs, ability to be independent	2
7/12/01	Record review; development of written parent report	3
8/6/01	Review/analysis of proposed 01-02 IEP	2

Subtotal: 45 3/4
Fee: $9,150

Appendix C

2001-2002 School Year

DATE	SERVICE	HOURS
9/5/01	Development of Petitioners Index	2
9/6/01	Conference call w/Diane Phalen at St. Francis Hospital re: Joe's language therapy needs	1/2
9/10/01	Conference call w/Director of St. Francis Communication Dept. re: Joe's therapy	1/4
9/18/01	Development of Costello/Donegan questions	5
9/21/01	Parent conference re: Joe's state of mind/future	2
9/23/01	Parent conference re: Joe's grand mal seizure	1
9/25/01	Parent consultation re: Joe's neurological status	1
10/12/01	Parent consultation re: changes needed in Joe's program/transportation	1
1/2/02	Development of Arons to Murphy letter	2

Appendix C

DATE	SERVICE	HOURS
1/19/02	Parent consultation re: IEP needs for Joe	1/4
7/18/02	Review of WIAT testing/Frontera statement; parent consultation to prepare for CSE meeting	1 1/2
7/19/02	Attendance/participation at Annual Review; parent/student conference	5
	Subtotal:	21 1/2
	Fee:	$4,300

Total Consultation Hours=125 1/2 Total fee: $29,350

APPENDIX D — LETTER FROM PEARL AND THEODORE MURPHY REQUESTING ORDER THAT ARLINGTON CENTRAL SCHOOL DISTRICT PAY MILEAGE EXPENSES INCURRED BY PLAINTIFFS

Pearl Murphy
142 Reilly Rd.
Lagrangeville
New York 12540

February 12, 2003

Honorable Judge Haight, Jr.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RE: Murphy v. Arlington
RE: prevailing party fees

Dear Judge Haight,

Please find attached the calculated out of pocket expenses pertaining to travel over the past four years of litigation. Thank you for your consideration.

Sincerely,

s/ Pearl Murphy
Pearl Murphy

CC: Jeffrey Schiro, esq.
CC: File

Appendix D

CERTIFICATION

I, Pearl Murphy, being of full age, do hereby certify that the following statements are true to the best of my ability. I am aware that if any of these statements are knowingly false, I am subject to punishment.

1. The mileage rate of 36.5 cents per mile for calculated out of pocket expenses pertaining to travel over the past four years of litigation.

s/ Pearl Murphy
Pearl Murphy

Date: February 11, 2003

Appendix D

Mileage expense
Marilyn Arons Transportation

11/1/97	162.76 miles	36.5 cents per mile
11/5/97	325.52 miles	36.5 cents per mile
12/3/97	325.52 miles	36.5 cents per mile
10/28/98	325.52 miles	36.5 cents per mile
11/2/98	325.52 miles	36.5 cents per mile
11/18/98	325.52 miles	36.5 cents per mile
11/20/98	325 52 miles	36.5 cents per mile
12/9/98	162.76 miles	36.5 cents per mile
12/10/98	162.76 miles	36.5 cents per mile
4/12/98	325.52 miles	36.5 cents per mile
6/2/98	325.52 miles	36.5 cents per mile
81.38 miles each way		(Krouner Hearing)
12/16/00	325.52 miles	36.5 cents per mile
4/3/00	162.76 miles	36.5 cents per mile
4/5/00	162.76 miles	36.5 cents per mile
5/3/00	325.52 miles	36.5 cents per mile
6/5/00	162.76 miles	36.5 cents per mile
6/6/00	162.76 miles	36.5 cents per mile

Kaufman Hearing

Appendix D

1/18/01	325.52 miles	36.5 cents per mile
Visited the Dutchess program		
5/22/01	325.52 miles	36.5 cents per mile
6/15/01	325.52 miles	36.5 cents per mile
7/19/01	325.52 miles	36.5 cents per mile
Annual Review		

Farago Hearing

Total for Marilyn Arons transportation: $6.161.22

Dr. Brooks Speech and language therapy

10/15/97	29.94 miles	36.5 cents per mile
10/16/97	29.94 miles	36.5 cents per mile
10/20/97	29.94 miles	36.5 cents per mile
10/22/97	29.94 miles	36.5 cents per mile
10/29/97	29.94 miles	36.5 cents per mile
10/31/97	29.94 miles	36.5 cents per mile
11/3/97	29.94 miles	36.5 cents per mile
11/10/97	29.94 miles	36.5 cents per mile
11/17/97	29.94 miles	36.5 cents per mile
11/21/97	29.94 miles	36.5 cents per mile
11/24/97	29.94 miles	36.5 cents per mile

Appendix D

12/1/97	29.94 miles	36.5 cents per mile
12/3/97	29.94 miles	36.5 cents per mile
12/12/97	29.94 miles	36.5 cents per mile
12/17/97	29.94 miles	36.5 cents per mile
12/22/97	29.94 miles	36.5 cents per mile

14.29 miles each way
Total mileage cost: $366.21

Dr. Frontera Kingston Neurological

9/23/97	82.58 miles	36.5 cents per mile
11/18/97	82.58 miles	36.5 cents per mile
12/30/97	82.58 miles	36.5 cents per mile
8/4/98	82.58 miles	36.5 cents per mile
10/20/98	82.58 miles	36.5 cents per mile
12/22/98	82.58 miles	36.5 cents per mile
11/23/99	82.58 miles	36.5 cents per mile
9/19/00	82.58 miles	36.5 cents per mile
10/23/01	82.58 miles	36.5 cents per mile
2/19/02	82.58 miles	36.5 cents per mile
5/29/02	82.58 miles	36.5 cents per mile
7/16/02	82.58 miles	36.5 cents per mile

Appendix D

9/10/02	82.58 miles	36.5 cents per mile
1/7/03	82.58 miles	36.5 cents per mile

41.26 miles each way
Total mileage cost $1200.36

Dr. Harwood Neurologist

11/29/00	21 miles	36.5 cents per mile
12/3/00	21 miles	36.5 cents per mile
12/10/00	21 miles	36.5 cents per mile
12/17/00	21 miles	36.5 cents per mile

Total mileage cost $45.36

Dr. Jane Haley Neuro. Report

3/01	137 miles	36.5 cents per mile

68.69 miles each way
Total mileage cost $73.98

Total $ 7847.14

APPENDIX E — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED FEBRUARY 13, 2003

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

99 Civ. 9294 (CSH)

PEARL MURPHY AND THEODORE MURPHY,

Plaintiff

-against-

ARLINGTON CENTRAL SCHOOL DISTRICT BOARD OF EDUCATION,

Defendant.

MEMORANDUM AND ORDER

HAIGHT, *Senior United States District Judge*:

Plaintiffs Pearl and Theodore Murphy, parents of Joseph Murphy, a "child with a disability" within the meaning of the Individuals with Disabilities Education Act ("the IDEA"), 20 U.S.C. §§ 1400 *et seq.*, were the prevailing parties in an action they commenced under that statute against defendant Arlington Central School District Board of Education ("Arlington") to require Arlington to assume financial responsibility for their child's tuition at a private school during certain school years. The Court of Appeals affirmed this Court's judgment in plaintiffs' favor. *Murphy v. Arlington Central School District Board of Education*, 297 F.3d 195 (2d Cir. 2002).

Appendix E

Plaintiffs now ask this Court for a further order directing Arlington to pay costs they incurred during the administrative proceedings before the local educational agency and this litigation. Specifically, plaintiffs seek to recover the fees of Marilyn Arons, M.S., an educational consultant, and mileage expenses plaintiffs incurred in transporting Joseph to and from Arons' office, the offices of neurologists and speech therapists, and administrative hearings. According to the documents plaintiff submit in support of their claims, Arons devoted 125.5 "consultation hours" to the case. At her hourly rate of $200, plaintiffs' claim in respect of Arons' services is $29,350.[1] Plaintiffs' mileage claim totals $7,847.14 and is based upon a rate of 36.5 cents per mile.

The IDEA's fee-shifting provision states that "[i]n any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents of a child with a disability who is the prevailing party." 20 U.S.C. § 1415(i)(3)(B). While the statute does not specify what falls within allowable costs, a prevailing parent's entitlement is construed broadly, and courts routinely allow the sort of expenses claimed by plaintiffs at bar. *See, e.g., B.K v. Toms River Board of Education*, 998 F.Supp. 462, 476 (D.N.J. 1998) ("Congress usually does not intend for the fees or costs of experts to be awarded as part of a reasonable attorney's fee. However, the statute in this case is an exception.

1. Arons' "certification" accompanying plaintiffs' claim states: "Because of the unusual nature of this case, as well as the fragile state of [the Murphys'] son's development, I agreed to take the case on a contingency. A verbal contract was agreed upon in which the family agreed to seek my fees from the Arlington School District or a court of competent jurisdiction in the event there was litigation and the family became the prevailing party."

Moreover, courts have awarded expenditures such as photocopying, *travel*, long distance telephone and postage to prevailing IDEA plaintiffs as part of their attorneys' fee award." (citations and internal quotation marks omitted) (emphasis added).

This case presents an anomaly because the plaintiffs are not in a position to claim an award for attorneys' fees, at least with respect to the administrative proceedings and the litigation before this Court. That is because the Murphys did not retain an attorney to assist them during those stages, at which the Murphys conducted Joseph's case *pro se* (they were represented by counsel in the Court of Appeals).[2] They should not have been permitted to do so in this Court; as the Court of Appeals observed, "[i]n this Circuit, a non-attorney parent is precluded from representing his or her child in federal court." 297 F.3d at 201. Counsel for Arlington, having failed to object to plaintiffs' *pro se* status in this Court and disappointed by the judgment in plaintiffs' favor, urged it as an alternate basis for reversal in the Court of Appeals, which made short shrift of the argument, finding no reversible error. Judge Sotomayor's opinion observes that the purpose of the rule against parental *pro se* representation "is to protect the interests of minor children by ensuring they receive adequate representation," and added. "It is hardly in the best interest of Joseph Murphy to vacate an injunction that inures to his benefit so that he may re-litigate this issue below with licensed representation in order to re-secure a victory already obtained." *Id.*

2. The report of the case identifies Edward A. Acito as counsel for plaintiffs-appellees on the appeal. Plaintiffs' present claim does not include any fee of appellate counsel, although it would appear to be recoverable under the authorities cited in text. Plaintiffs may supplement their claim in this regard if the circumstances would support it.

In recalling this procedural history, I intimate no view on whether costs that would seemingly be recoverable as an additional element in a claim for attorneys' fees are recoverable as stand-alone items when attorneys' fees were not incurred.

Arlington may agree to pay these costs, or contest them with respect to liability, amount, or both, In the latter event, Arlington is directed to file and serve papers responding to plaintiff' claims on or before March 7, 2003. If they wish to do so, plaintiffs may file and serve reply papers on or before March 21, 2003.[3] The Court Will then regard the case as submitted for decision.

It is SO ORDERED.

Dated: New York, New York
February 13, 2003

s/ Charles S. Haight, Jr.
CHARLES S. HAIGHT, JR.
SENIOR UNITED STATES DISTRICT JUDGE

3. Since § 1415(i)(3)(B) allows payment of costs "*to the parents* of a child with a disability who is the prevailing party" (emphasis added), the Murphys are the parties in interest on this aspect of the case, and may proceed *pro se*.

APPENDIX F — AFFIDAVIT OF BARBARA J. DONEGAN IN OPPOSITION TO PLAINTIFFS' APPLICATION FOR FEES AND COSTS DATED MARCH 6, 2003 WITH EXHIBITS

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

99 Civ. 9294 (CSH)

Hon. Charles S. Haight, Jr.

PEARL MURPHY and THEODORE MURPHY,

Plaintiffs,

- against -

ARLINGTON CENTRAL SCHOOL DISTRICT BOARD OF EDUCATION

Defendant.

AFFIDAVIT OF BARBARA J. DONEGAN IN OPPOSITION TO PLAINTIFFS' APPLICATION FOR FEES AND COSTS

Appendix F

STATE OF NEW YORK)
) ss.:
COUNTY OF DUTCHESS)

BARBARA J. DONEGAN, being duly sworn, deposes and says:

1. I am the Assistant Superintendent for Pupil Personnel Services for the Arlington Central School District (the "District") and I have served the District in this capacity for all times relevant to this matter. I am fully familiar with the facts and circumstances surrounding the parents' application. I make this Affidavit in opposition to the plaintiffs' application for fees and costs.

2. Federal and state law assures that all children with disabilities have available to them a free appropriate public education designed to meet their unique learning needs. As the Assistant Superintendent for Pupil Personnel Services, I supervise the District's Committee on Special Education (the "CSE"). The primary mission of the CSE is to identify, locate, and evaluate all disabled children within the District's borders and develop individualized education programs ("IEP's") that address their educational needs.

3. In an application dated January 7, 2003, supplemented on January 13, 2003, and again on February 12, 2003, the parents have requested that this Court direct the District to pay fees and costs they incurred during the administrative proceedings and federal litigation.

4. Specifically, the parents seek to recover the fees of Marilyn Arons, a non-lawyer advocate, and milage expenses

that Ms. Arons and the parents incurred. The District opposes the parents' fees and costs application.

5. The District does not challenge that the parents' are prevailing parties in this matter. Were the parents represented by counsel in these proceedings, their status as prevailing parties would entitle them to reimbursement of reasonable attorneys' fees and costs associated with the litigation. Here, however, the parents were "represented" at the impartial hearing by a non-lawyer advocate, they ignored the administrative appeal before the State Review Officer (the "SRO"), and proceeded *pro se* before this Court.

6. Ms. Arons' fees and costs cannot be recovered as a lawyer, expert, or litigation consultant. Ms. Arons is not licensed to practice law in this State or any other. At no level of these proceedings did Ms. Arons provide any testimony, expert or otherwise. Upon information and belief, Ms. Arons also lacks any specialized training in courtroom practice and procedure.

7. Similarly, the Court should deny or substantially reduce the amount of fees and costs claimed by Ms. Arons as an educational consultant because: (1) Ms. Arons' time records are inadequate; (2) the requested hourly rate is unreasonable; and (3) the CSE meetings for which Ms. Arons seeks fees and costs were not convened as a result of any administrative proceeding or judicial action.

Appendix F

STATEMENT OF THE CASE

8. The underlying matter from which this claim stems was for reimbursement for the unilateral placement of Joseph by his parents during the 1998/99 school year in a private institution that exclusively services disabled students.

9. Joseph's parents unilaterally enrolled him in the Kildonan School in Amenia, New York prior to a scheduled meeting of the CSE held on July 30, 1998.

10. By letter dated September 3, 1998, Joseph's parents requested an impartial hearing to determine whether or not the District should be required to reimburse them for the costs associated with the unilateral placement of their son in a private school along with costs associated with private speech therapy.

11. Thereafter, the District appointed Impartial Hearing Officer Leonard W. Krouner (the "IHO") from the State's list of certified hearing officers to serve as the hearing officer in this matter.

12. After a lengthy hearing, the IHO determined that the District had not afforded Joseph a free appropriate public education, held that Joseph's parents appropriately placed him at Kildonan, and awarded Joseph's parents reimbursement for private speech therapy.

13. Since his service in this matter, Mr. Krouner has plead guilty in Albany County (NY) to multiple charges of fraud for collecting disability insurance while also serving

as an impartial hearing officer. Mr. Krouner, who has previously been disciplined for unethical conduct, will surrender his law license (Def. Exs. A, B).

14. By petition dated August 17, 1999, the District sought review of the IHO's determination by the SRO as provided by the New York Education Law.

15. Rather than answer the allegations made in the District's petition, the parents filed an action for injunctive relief on August 6, 1999 in the District Court for the Northern District of New York.

16. The Honorable Thomas J. McAvoy, in a decision dated August 12, 1999, transferred the matter to the District Court for the Southern District of New York because the parents' claims arose, and all the parties reside in, the southern district.

17. Following the transfer to the southern district, the case was assigned to the Honorable Charles S. Haight, Jr. His Honor's chambers called the District's counsel and stated that the matter was being referred to a magistrate and disclosed that His Honor was the parent of a disabled student and had sued his public school district in the past over his child's education.

18. The matter was referred to Magistrate Judge Frank Maas who, after a pretrial conference on September 8, 1999, recommended that the parents' case be dismissed for lack of subject matter jurisdiction.

Appendix F

19. After the receipt of the parents' objections to Magistrate Judge Maas' report, the Court raised several questions, on its own motion, as to the timeliness and integrity of the administrative remedies in this matter and ordered the District to explain the relative merits of its administrative appeal through a series of interrogatories.

20. The Court did not add the New York State Education Department ("SED") as a party to this action, but instead, granted SED leave to submit a brief *amicus curiae* if so advised.

21. The District advised SED of the action, but it declined to appear.

22. Notwithstanding this declination, the District and SED have never been united in interest for purposes of these proceedings.

23. After reviewing the parties' responses to its interrogatories, the Court acknowledged that the District had timely filed its administrative appeal, but continued to reserve its decision on Magistrate Judge Maas' Report.

24. Stating that the SRO's delay in rendering a decision "cannot be tolerated," the Court retained jurisdiction over the matter and warned that it "will [not] hesitate to adjudicate Plaintiffs' claims for equitable relief if the SRO fails to reach a final decision by December 20, 1999."

25. Against this backdrop, on December 14, 1999, the SRO sustained the IHO's determination to award the parents

tuition reimbursement for their unilateral placement of Joseph in Kildonan for the 1998/99 school year.

26. The SRO, however, reversed the IHO's decision to reimburse the parents for private speech/language therapy they had secured during the 1997/98 school year.

27. Upon learning through status reports submitted by the parties that the SRO had filed a decision and order in the matter, the Court dismissed, as moot, the parents' complaint in a Memorandum and Order dated January 3, 2000.

28. In so doing, the Court expressly declined the parents' request that it issue a declaratory ruling "'regarding whether pendency occurs at the IHO or the SRO level'."

29. In a Memorandum and Order of January 11, 2000, the district court reiterated its dismissal of the parents' action and its refusal to decide the issues "not presently before the court."

30. Subsequent to the district court's January 3rd and January 11th Orders, the parents filed what they termed a "motion to compel," seeking not only reimbursement for their unilateral private placement of their son during the 1998/99 school year, but also payment for their son's private placement during the 1999/00 school year.

31. On its own motion, the Court converted the parents' "motion" into an ex *parte* application for an order to show cause.

32. The Court explained this reversal of position as "according plaintiffs' papers the lenity traditionally extended to *pro se* pleadings."

33. After reviewing submissions by the parties made in response to a second set of judicial interrogatories, the Court rendered a Memorandum Opinion and Order on March 1, 2000.

34. In its opinion, the Court interpreted the relevant statutory and regulatory framework to find that the Joseph's "stay-put" or pendency placement was, for all times relevant to the complaint, the private school he attended during the 1998/99 school year.

35. The Court of Appeals affirmed the district court's judgement in plaintiffs' favor.

36. On or about July 30, 2002, the parents supplied the Court of Appeals with a itemized and verified bill of costs (including a consultation fee claim of $500 for Ms. Marilyn Arons and $5,000 in attorneys' fees) for which they sought reimbursement by the District (Def. Ex. C).

37. In an Order filed on September 10, 2002, the Court of Appeals disallowed the parents itemized and verified bill of costs (Def. Ex. D).

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THE PARENTS' CLAIM FOR FEES AND COSTS

38. Ms. Arons' fees and costs cannot be recovered as a lawyer, expert, or litigation consultant.

39. Ms. Arons does not possess a license to practice law in the State of New York.

40. Ms. Arons did not give any expert testimony at any stage of these proceedings.

41. Upon information and belief, Ms. Arons has no specialized training in courtroom practice and procedure.

42. The Court should deny the parents' request for reimbursement for Ms. Arons' development of questions for witnesses at the impartial hearings.[1]

43. Reimbursement for these items is prohibited because Ms. Arons lacks a license to practice law and has no specialized training in courtroom practice and procedure for which she could be reimbursed as a litigation consultant.

44. The Court should deny or substantially reduce the amount of fees and costs claimed by Ms. Arons as an educational consultant because her time records are inadequate.

---

1. The District refers to entries from the parents' January 13, 2003 supplement for the following dates: October 21, 1998, October 26, 1998, November 17, 1998, April 8, 1999, May 12, 1999, May 25, 1999, April 2, 2000, April 4, 2000, September 5, 2001, September 18, 2001.

Appendix F

45. In connection with this lawsuit, the parents seek reimbursement for 125 1/2 hours of educational consultant time through June 2002.

46. Ms. Arons' December 20, 2002 Certification is the first instance in which the District has hearing Ms. Arons refer to herself as an "educational consultant." Throughout the impartial hearing before IHO Krouner, Ms. Arons insisted that she be referred to as a "non-lawyer representative."

47. Neither the parents nor Ms. Arons have provided the Court with contemporaneous time sheets or computer records to support this part of their application.

48. Instead, the parents have presented the Court with a December 20, 2002 Certification by Ms. Arons as what services she believes she provided them with in the past.

49. Without contemporaneous record keeping, it is difficult, if not impossible, to evaluate the reasonableness of the hours claimed by Ms. Arons.

50. While in other circumstances, i.e., if the parents had been represented by counsel in the federal action, the Court could cure the lack of contemporaneous record keeping with a review of the extent and quality of submissions made to the Court, here, no such substitution is possible because Ms. Arons never appeared (assuming, for purposes of argument, that she could) before this Court.

51. The Court should deny or substantially reduce the amount of fees and costs claimed by Ms. Arons as an educational consultant because the requested hourly rate is unreasonable.

Appendix F

52. In her December 20, 2002 Certification, Ms. Arons quotes her "established market value" as $200 per hour.

53. How Ms. Arons established this market value is a mystery. Unlike experienced litigators, there is no market for non-lawyer advocates or educational consultants.

54. There is no license sponsored by the State of New York to practice as an educational consultant.

55. The State of New York does not recognize nor authorize non-lawyers to represent parents or children in special education proceedings.

56. No substitute evidence of skill, expertise, and experience has been offered by Ms. Axons or the parents to justify Ms. Arons' alleged "market value."

57. The Court should deny or substantially reduce the amount of fees and costs claimed by Ms. Arons as an educational consultant because the CSE meeting for which Ms. Arons seeks fees and costs were not convened as a result of any administrative proceeding or judicial action.

58. Even if the Court chooses to equate the work of licensed attorneys with that of unlicensed educational consultants, many of Ms. Arons' claimed hours involve activity unrelated to the federal action previously before this Court.

59. According to her December 20, 2002 Certification, nearly 40 of the 125 1/2 hours claimed by Ms. Arons concern her preparation, attendance, and participation at CSE meetings for Joseph between the 1997/98 school year and the 2001/2002 school year.

Appendix F

60. The action before this Court concerned the rights and liabilities of the parties in light of Joseph's unilateral placement during the 1998/99 school year.

61. The only compensable fees and costs of Ms. Arons are those arising during that school year or those that resulted from this Court's March 1, 2000 Memorandum Opinion and Order.

62. None of the CSE meetings referenced in Ms. Arons' Certification resulted from this Court's March 1, 2000 Memorandum Opinion and Order.

63. Instead, they resulted from the District's continuing obligation under federal and State law to develop an appropriate program for Joseph that would be reasonably calculated to meet his unique learning needs in the least restrictive environment.

64. For similar reasons, the Court should deny the parents reimbursement for Ms. Arons' milage expenses from December 16, 2000 through July 19, 2001.

65. These expenses were incurred by Ms. Arons in the context of hearings unrelated to the matter before this Court and/or CSE meetings that were convened by the District in accordance with continuing obligations under federal and State law.

66. Likewise, should the Court dismiss, as unrecoverable, Ms. Arons' charges from the hearing before IHO Leonard W. Krouner, her milage charges for November 1, 1997 through June 2, 1998 should also be dismissed.

67. Ms. Arons' November 9, 1998 charge for review of a scholarly article should not be reimbursed because such review

amounts to professional development, which, like overhead, is not recoverable.

68. Lastly, in light of the fact that both the SRO and this Court dismissed the parents' claim for private speech/language therapy secured by the parents during the 1997/98 school year, their milage claims from October 15, 1997 through December 22, 1997 should be similarly dismissed.

CONCLUSION

69. Ms. Arons' fees and costs cannot be recovered as a lawyer, expert, or litigation consultant as a matter of law.

70. The Court should also deny or substantially reduce the amount of fees and costs claimed by Ms. Arons as an educational consultant because: (1) Ms. Arons' time records are inadequate; (2) the requested hourly rate is unreasonable; and (3) the CSE meetings for which Ms. Arons seeks fees and costs were not convened as a result of any administrative proceeding or judicial action.

s/ Barbara J. Donegan
Barbara J. Donegan

Sworn to before me this 6th
day of March, 2003.

s/ [illegible]
Notary Public

Appendix F

EXHIBIT A

[Intentionally omitted]

Appendix F

EXHIBIT B

[Intentionally omitted]

Appendix F

EXHIBIT C

[Intentionally omitted]

Appendix F

EXHIBIT D

[Intentionally omitted]

APPENDIX G — LETTER FROM PEARL AND THEODORE MURPHY RESPONDING TO ARLINGTON CENTRAL SCHOOL DISTRICT'S OBJECTION TO PLAINTIFFS' APPLICATION FOR REIMBURSEMENT OF CONSULTATION EXPENSES AND MILEAGE

Pearl Murphy
142 Reilly Rd.
Lagrangeville, New York 12540

March 19, 2003

Honorable Judge Haight, Jr.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RE: Murphy v. Arlington
RE: prevailing party fees

Dear Judge Haight,

Please find our response pertaining to Arlington's position on our claim for fees.

Sincerely,

s/ Pearl Murphy
Pearl Murphy

CC: Jeffrey Schiro, esq.
File

Appendix G

CERTIFICATION

I, Pearl Murphy being of full age, do by certify that the following statements are true to the best of my ability. I am aware that if any of these statements are knowingly false, I am subject to punishment.

1. I have read the affidavit of Barbara Donegan and the memorandum of law of Jeffrey Schiro in response to our claim for fees.

2. My dispute with Arlington began in 1997-98 school year concerning the refusal of the CSE to address our sons language needs in his IEP. As early as October of 1997 I was trying to get the school to use the input of Mr. Brooks and allow me to attend the meeting Mr. Brooks had with the school staff. Because of the schools actions toward me and their refusal to meet Joey's needs, I sought out Mrs. Arons.

3. Because Joey was not getting the services he needed and because we thought we had to prepare for a hearing, I met with Mrs. Arons on 11/1/97 and explained our case to her. As a result she dictated my letter to the school district which was received on 11/4/97. All actions concerning Joey and our efforts to obtain appropriate services started with the 11/1/97 meeting with Mrs. Arons.

4. Mrs. Arons was not a licensed driver, which she explained to us on our 11/1/97 meeting. Therefore, in order to receive her consultation and representation we either had to drive her round trip or hire a taxi service. It was cheaper for us to drive her. We have received Mrs. Arons bill. It reflects only

about a third of the time she provided to us and Joey. Her bill does not seek any consulting fees for matters relating to the second circuit appeal.

5. We have contacted our attorney Richard Acito about his bill. He told us that he had applied for fees to the second circuit on the work he had done on the districts appeal of our decision. His request for fees was denied. Therefore, no fees for Mrs. Arons or Mr. Acito are reflected in our request for fees.

s/ Pearl Murphy
Pearl Murphy

March 19, 2003

APPENDIX H — SUPPLEMENTAL CERTIFICATION DATED MARCH 18, 2003

SUPPLEMENTAL CERTIFICATION

I, Marilyn Arons, do hereby certify that the following statements are true to the best of my ability. I am aware that if any of these statements is knowingly false, I am subject to punishment.

1. I have been asked by Pearl Murphy to read the Affidavit of Barbara Donegan in opposition to payment of my fees relative to factual accuracy. I have done so and find several errors in her sworn statements.

2. In my original certification I provided the case law concerning my market value and the areas for which I was permitted to charge in *Connors*. It is apparent that Mrs. Donegan has not had the opportunity to read those opinions or to inquire about them, or she could not have made the statements she did in her affidavit

3. My bill is a minimal reflection of the number of hours and degree of work that I provided the Murphys relating to their son's needs, and includes no billing that I understand to pertain the work attornies do. Relative to the questions asked at hearings, it is my experience that special educators write those questions for the attornies involved because attornies do not understand the implications of diagnostic reports or the contents of IEPs. During the Murphy hearings, I observed Mr. Schiro to ask the members of the Arlington CSE about the meaning of test results, and the staffs' development of questions for him to ask about these and related matters. I did not need such consultation because of

being a special educator, and, as such, billed for the development of questions for witnesses in the three hearings conducted in this matter.

4. It is asserted that my time records are inadequate. I log the time in chronological order, writing hours on the back of the actual pupil record I have read or developed. When doing record reviews or those functions that do not result in the generation of a document, individual billing notes are placed in the file when I take a case on a contingency basis. In matters that are a direct fee for service, a billing sheet is kept. I do not do this for such cases as the Murphys because there is a chance that no bill will be required if the parent does not prevail. The documentation is kept contemporaneously with the time that the service was provided. This file is extremely large, but I am glad to produce those records if requested.

5. Mrs. Murphy first came to me regarding the disputed bill on 11/1/97. At that time she indicated that she had a serious dispute with her school district over her son's language needs for which she was privately paying for language therapy. My task was to figure out what her son needed and to make the district recognize his needs for language therapy. I advised her to utilize the IEP process first because that was the place to try and resolve the disputes. I reviewed pupil records, prepared a document and actively participated in an IEP meeting on 11/5/97 for the purpose of either resolving the problem or to utilize appropriate procedural safeguards. That first IEP meeting was the basis for everything that followed in the years leading to the present time.

Appendix H

6. I do have specialized training in courtroom practice and procedure through the Office of Administrative Law in New Jersey. However, none of that training is utilized in this bill or in any bill in that I am not permitted to charge attorney's fees as a nonlawyer.

7. No fees have been charged for any consultation with Richard Acito, Esq., the attorney who represented the Murphys in the Second Circuit appeal. Mr. Acito applied for fees in that case, seeking $500 for me. That application was rejected. As a result of that Second Circuit ruling, I attempted to be particularly careful not to consider any time pertaining to that appeal in my bill.

8. The Murphy case had three hearings, one after the other. Often there were four layers of litigation occurring at the same time, impartial hearing, Supreme Court, Appellate Court, and Federal Court. Throughout, Joseph and his parents tried to get his special needs met. From the beginning I had suspected some form of seizure disorder because of his behavior and affect. He was a gentle, sweet young man, extremely vulnerable, without the kind of "street smarts" he needed to survive. I was his contact when he was frightened, when he wanted to talk about school, when he was angry about what he perceived to be the injustice done to him. I was the only person outside of his parents that he had to talk to or to confide in. The school district's actions against him frightened him and confused him. I was his support person until he recently began to receive private therapy. None of that time is

reflected in my bill. That bill includes only those services that are documented in my billing file.

9. Mrs. Donegan, at #67 of her affidavit, objects to my review of a scholarly article on 11/9/98. My bill reflects that service to be done on 11/8/98. (A copy of that article is attached to this certification.) The article was given to me by Mrs. Murphy, who had received it from Gerry Brooks. Mrs. Murphy did not understand it and asked nee to read it and explain it to her. I did.

10. There has been an issue raised about paying Mrs. Murphy for transporting me to and from Arlington. I have not been a licensed driver since 1968. Every parent who used my services since 1977 either paid for private trar.sportation, paid for train or plane, or did the driving themselves. Each time I had to come to Arlington, Mr. Murphy drove to Teaneck to get me, drove us back to Arlington, brought me back to Teaneck, and then drove home. Unless this had been done, I could not have provided any service to this family.

March 18, 2003

s/ Marilyn Arons

APPENDIX I — LETTER FROM ARLINGTON CENTRAL SCHOOL DISTRICT OBJECTING TO PLAINTIFFS' APPLICATION FOR REIMBURSEMENT OF CONSULTATION EXPENSES AND MILEAGE

RAYMOND G. KUNTZ, P.C.
Attorneys at Law

March 26, 2003

Hon. Charles S. Haight, Jr.
United States Courthouse
Foley Square, Room 1940
New York, New York 10007

Re: Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.
99 Civ. 9294 (CSH)
Our File No. ARL 6.420N

Dear Judge Haight:

We are the attorneys for the Arlington Central School District Board of Education (the "District") in the above captioned matter.

In that capacity, we are in receipt of a plaintiffs' reply papers concerning their fee application. Rather than reiterate the entirety of the District's objections to the parents' fee application, we wish to direct the Court's attention to the following limited points:

- New York State regulations do *not* presently recognize or authorize lay advocates to *represent* parents at special education due process hearings. *Compare* N.Y.

Appendix I

Comp. Codes R. & Regs. tit. 8(A-1), § 200.5(i)(3)(vii) (2002) *with* N.Y. Comp. Codes R. & Regs. tit. 8(A-1), § 200.5(c)(5) (1998).

- Although favorably cited by the plaintiffs, the Court in *Connors v. Mills* unequivocally held that fee shifting provision of the Individuals with Disabilities Education Act does *not* include within its scope the fees of a non-attorney advocate. *See Connors v. Mills*, 34 F. Supp.2d 795, 808 (N.D.N.Y. 1998).

- While the Court in *Connors* speculates, in *dicta*, that Ms. Arons may be able to recover her fees as an educational consultant, no such theory of recovery is countenanced under federal or state law.

- Ms. Arons' admission, in her March 18, 2003 Supplemental Certification, that she has failed to keep contemporaneous billing records for her activity in this matter preclude her recovery for such activity as an educational consultant,

To:

Mr. & Mrs. Theodore Murphy, *pro se*
RD 3, Box 275, Reilly Road
LaGrangeville, New York 12540

APPENDIX J — AFFIDAVIT OF BARBARA J. DONEGAN IN SUPPORT OF DEFENDANT'S APPLICATION FOR A STAY PURSUANT TO RULE 62(d)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

99 Civ. 9294 (CSH)

Hon. Charles S. Haight, Jr.

PEARL MURPHY and THEODORE MURPHY,

Plaintiffs,

- against -

ARLINGTON CENTRAL SCHOOL DISTRICT
BOARD OF EDUCATION

Defendant.

AFFIDAVIT OF BARBARA J. DONEGAN IN SUPPORT OF DEFENDANT'S APPLICATION FOR A STAY PURSUANT TO RULE 62(d)

STATE OF NEW YORK)
) ss.:
COUNTY OF DUTCHESS)

Appendix J

BARBARA J. DONEGAN, being duly sworn, deposes and says:

1. I am the Assistant Superintendent for Pupil Personnel Services for the Arlington Central School District (the "District") and I have served the District in this capacity for all times relevant to this matter. I am fully familiar with the facts and circumstances surrounding the District's application. I make this Affidavit in support of the District's application for a stay of the Court's July 22, 2003 Memorandum Opinion and Order pending appeal.

2. The Court's Order concerned the entitlement of the plaintiffs, parents of a disabled child who successfully sued the District to recover their child's tuition at a private school during certain school years, to recover costs incurred for the services of an educational consultant and transportation costs incurred by plaintiffs during the pertinent times.

3. Applying the fee-shifting provisions of the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, *et. seq.*, (the "IDEA") the Court ordered the District to pay certain fees of an educational consultant, at a rate of $200/hour, secured by the parents for litigation purposes.

4. On August 20, 2003, the District filed a Notice of Appeal of the Court's July 22, 2003 Memorandum Opinion and Order with the Clerk of the Court of the United States District Court for the Southern District of New York.

5. The issue of whether the services of an educational consultant are compensable under the IDEA's attorneys' fees

provisions is a matter of first impression not previously considered by the United States Court of Appeals for the Second Circuit and a matter that impinges on the rights of states to regulate and monitor the conduct of persons admitted to practice law in the states.

6. The Court has the authority under Rule 62(d) of the Federal Rules of Civil Procedure to stay is July 22, 2003 Memorandum Opinion and Order pending appeal. Rule 8(a) of the Federal Rules of Appellate Procedure states that a stay of judgment should be sought from the district court under Rule 62(d) before seeking a stay from the appellate court.

7. A stay of the Court's July 22, 2003 Memorandum Opinion and Order would not cause irreparable harm to the parents. Ms. Marilyn Arons certified to the Court on December 20, 2002 that she has provided the parents with services in this matter on a contingency basis. Ms Arons has not articulated any present intent to collect part or all of her claimed fee from the parents.

8. The District currently funds the student's education at Dutchess Community College, as well as provides the student with certain related services keyed to the student's individualized needs and abilities. The parties have amicably developed special education service plans for the student since the 2000/01 school year.

9. The District is prepared to post a supersedeas bond pending any stay granted by the Court if so directed by the Court.

Appendix J

s/ Barbara J. Donegan
Barbara J. Donegan

Sworn to before me this 21st
day of August, 2003

s/ Jeffrey J. Schiro
Notary Public

APPENDIX K — MEMORANDUM OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED AUGUST 29, 2003

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

99 Civ. 9294 (CSH)

PEARL MURPHY AND THEODORE MURPHY,

Plaintiffs,

-against-

ARLINGTON CENTRAL SCHOOL DISTRICT BOARD OF EDUCATION,

Defendant.

MEMORANDUM

HAIGHT, *Senior United States District Judge*:

In an opinion reported at 2003 WL21694398 (S.D.N.Y. July 22, 2003), the Court adjudicated the plaintiffs' right to recover costs and fees. Plaintiffs sought to recover from defendant $29,350 in respect of services rendered by Marilyn Arons and $7,874.14 in respect of mileage expenses incurred by plaintiff Pearl Murphy, for a total of $37,224.14. The Court disallowed the mileage claim, reduced the Arons claim to $8,650, and directed defendant to pay that amount to plaintiffs.

Defendant filed a timely notice of appeal, and now moves pursuant to Federal Rule of Civil Procedure 62(d) for a stay

of this Court's order pending appeal. In aid of that motion, defendant's assistant superintendent says that "[t]he District is prepared to post a supersedeas bond pending any stay granted by the Court if so directed by the Court." Donegan affidavit at ¶ 9. Defendant misconstrues Rule 62(d), which provides in pertinent part: "When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay . . ." Thus the giving of a supersedeas bond to obtain a stay is mandated by the Rule; a Court direction that the bond be given is neither necessary nor appropriate.

Counsel for the District should consult Local Civil Rule 65.1.1. for the procedures to be followed. Presumably the District will furnish a surety company bond. The Clerk of the Court maintains a list of approved surety companies. A bond issued by an approved surety company is presented to the Judgment and Orders Clerk, who examines it for form and content and, if the Clerk approves the bond, the Clerk endorses the bond and files it without first submitting it to the District Judge. Ordinarily the Clerk requires that security be given for 111% of the amount specified in the judgment or order from which the appeal will be taken. Other forms of security pending appeal are available, and are described in the local rule.

The Court will not consider defendant's motion for a stay until the record demonstrates that proper security has been lodged with the Clerk.

It is SO ORDERED.

Appendix K

Dated: New York, New York
August 29, 2003

s/ Charles S. Haight, Jr.
CHARLES S. HAIGHT, JR.
U.S.S.D.J.

FILED
FEB 2 1 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-18

IN THE

Supreme Court of the United States

ARLINGTON CENTRAL SCHOOL DISTRICT
BOARD OF EDUCATION,

Petitioner,

v.

PEARL MURPHY and THEODORE MURPHY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Does the attorneys' fees shifting provision of the Individuals with Disabilities Education Act (the "IDEA"), 20 U.S.C. § 1415(i)(3)(B), authorize a court to award expert fees to the parents of a child with a disability who is a prevailing party under the IDEA?

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STATUTE INVOLVED IN THIS MATTER

This case turns on the interpretation and application of the IDEA's attorneys' fees shifting provision, 20 U.S.C. § 1415(i)(3)(B).

> **Title 42 United States Code, Section 1415(i)(3)(B). Award of attorneys' fees.**
>
> In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents of a child with a disability who is the prevailing party.

INTRODUCTION

The IDEA, 84 Stat. 175, as amended, 20 U.S.C. § 1400, *et seq.*, is a Spending Clause statute that seeks to ensure that "all children with disabilities have available to them a free appropriate public education," *see* 20 U.S.C. § 1400(d)(1)(A).[1] Under the IDEA, school districts must create an "individualized education program" ("IEP") for each disabled child. *See* 20 U.S.C. § 1414(d). If parents believe their child's IEP is inappropriate, they may request an "impartial due process hearing." *See* 20 U.S.C. § 1415(f). The Court recently held that at such a hearing the party seeking relief bears the burden of proving its entitlement to the relief requested. *See Schaffer v. Weast*, 546 U.S. __, 126

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1. The IDEA was recently amended by the Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA"), Pub. L. No. 108-446, 118 Stat. 2647 (Dec. 3, 2004), which took effect on July 1, 2005. Because the events related to this case occurred prior to the IDEIA's effective date, all statutory citations refer to the IDEA, as codified prior to the enactment of the IDEIA. *See Lillbask v. State of Conn. Dep't of Educ.*, 397 F.3d 77, 80 n.1 (2d Cir. 2005).

S. Ct. 528, 535 (2005). A party aggrieved at the conclusion of an impartial due process hearing may seek further administrative review of the dispute by the state educational agency, *see* 20 U.S.C. § 1415(g), and, if still aggrieved, pursue a civil action in either state or federal court, *see* 20 U.S.C. § 1415(i)(2)(A). A court, in its discretion, "may award reasonable attorneys' fees as part of the costs to the parents of a child with a disability who is the prevailing party." *See* 20 U.S.C. § 1415(i)(3)(B).[2] The issue is whether or not the IDEA additionally authorizes prevailing parents to recover from public school districts the costs of experts whom parents have secured to participate in litigation over IEPs. The Court should hold that the text of the IDEA unambiguously authorizes only the award of attorneys' fees – and not expert fees – to parents who prevail in IDEA litigation. *See* 20 U.S.C. § 1415(i)(3)(B).

STATEMENT OF THE CASE

I. Statutory Background

IDEA is "frequently described as a model of 'cooperative federalism.'" *Little Rock Sch. Dist. v. Mauney*, 183 F.3d 816, 830 (8th Cir. 1999). It "leaves to the States the primary responsibility for developing and executing educational programs for handicapped children, [but] imposes significant requirements to be followed in the discharge of that responsibility." *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 183 (1982).

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2. This subsection of the IDEA has not been altered since the 1997 Amendments. *See Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 402 F.3d 332, 333 n.1 (2d Cir. 2005), *cert. granted*, 126 S. Ct. 978 (2006). While certain portions of the 1997 Amendments did not take effect until 1998, the 1997 revision to Section 1415 took effect immediately upon passage. See IDEA Amendments of 1997, Pub. L. No. 105-17, § 201(a), 111 Stat. 37, 156.

Congress first passed the IDEA as part of the Education of the Handicapped Act in 1970 ("EHA"), 84 Stat. 175, and amended it substantially in the Education for All Handicapped Children Act of 1975, 89 Stat. 773. In 1986, Congress again amended the EHA with the Handicapped Children's Protection Act of 1986, 100 Stat. 796, to, *inter alia*, authorize the award of reasonable attorneys' fees to certain prevailing parties and to clarify the effect of the EHA on rights, procedures and remedies under other laws relating to the prohibition of discrimination. In 1997, Congress reauthorized the (now renamed) IDEA, 111 Stat. 37, and codified that attorneys' fees may not be awarded relating to any meeting of the IEP Team (with exceptions not relevant here) and authorized reductions in amounts of attorneys' fees under certain circumstances. Congress most recently amended the IDEA in 2004, 118 Stat. 2647, renamed the Act the Individuals with Disabilities Education Improvement Act ("IDEIA") and provided that state or local educational agencies may recover their reasonable attorneys' fees if a due process complaint is found to be frivolous, unreasonable or without foundation, *see* IDEIA § 615(i)(3)(B)(i)(II).

II. Statement of Facts

The Arlington Central School District ("District") is a public school district duly organized, existing and operating consistent with the Education Law of the State of New York. *See* N.Y. Educ. Law § 1804 (McKinney Supp. 2005). Under the IDEA, the District is a "local educational agency," *see* 20 U.S.C. § 1401(15)(A), responsible for the identification and evaluation of children with disabilities residing within its territorial boundaries, *see* 20 U.S.C. § 1412(a)(3)(A). The IDEA aims "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs." 20 U.S.C. § 1400(d)(1)(A). Once the children are identified, the District is responsible to provide resident children

with disabilities between the ages of 3 and 21 with a "free appropriate public education." *See* 20 U.S.C. § 1412(a)(1)(A).

As Congress found in 2004, since the statute was originally enacted in 1975, IDEA "has been successful in ensuring children with disabilities and the families of such children access to a free appropriate public education and in improving educational results for children with disabilities." *See* IDEIA § 601(c)(3). Today, more than 6.4 million children – 13.4 percent of the public school enrollment in America – receive special education services through IDEA. *See* U.S. Dep't of Educ., *Digest of Education Statistics 2003*, Table 54 (Dec. 2004). The Board of Education members volunteer their time and the District's teachers, administrators, and related service providers (e.g., school psychologists, school social workers, school nurses, occupational therapists, physical therapists, assistive technology personnel, etc.) devote their efforts daily to the education of children with disabilities to fulfil the requirements of IDEA and, more to the point, to provide the best education possible to those in their care.[3]

---

3. The District spent $15,673 per pupil for special education and $5,741 per pupil for general education. *See* New York State School District Report Card, Fiscal Accountability Supplement for Arlington Cent. Sch. Dist. (2002/03 school year), *available at http://emsc32.nysed.gov/repcrd2004/supplement/131601060000.pdf* (last visited Feb. 1, 2006). The national average spending per pupil for special education is about $12,600 a year – more than $8,000 of which is for special education services; the national average is $6,500 for general education students. *See* U.S. Dep't of Educ., *Twenty-fourth Annual Report to Congress on the Implementation of the IDEA*, I-22, I-26 (2002).

The vast majority of IDEA-related spending is paid for by state and local governments. In the 1999/00 school year, for example, school districts received only $3.7 billion in federal assistance under

(Cont'd)

According to statistics compiled and published by the New York State Education Department ("NYSED"), as of the 2003/04 school year, the District had a total K-12 enrollment of 10,102 students. *See* New York State School District Report Card, *Comprehensive Information Report*, Form-A (March 3, 2005), *available at http://emsc32.nysed.gov/repcrd2004/cir/131601060000.pdf* (last visited Feb. 1, 2006). The District's classification rate, or number of students classified under the IDEA as children with disabilities, for the 2003/04 school year was 11.9 percent, equivalent to the statewide average. *See* New York State School District Report Card, *Information about Students with Disabilities for Arlington Cent. Sch. Dist., available at http://emsc32.nysed.gov/repcrd2004/supplement/131601060000.pdf* (last visited Feb. 1, 2006). As of December 1, 2003, less than 20 percent of the District's classified students spent more than 60 percent of their time outside of a regular education classroom. *See id.*

The core of the statute is the cooperative process that it establishes between parents and schools. *See Rowley*, 458 U.S. at 205-206. ("Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process, . . . as it did upon the measurement of the resulting IEP against a substantive standard"). "The central vehicle for this collaboration is the IEP process." *Schaffer*, 126 S. Ct. at 532. State educational authorities must identify and evaluate disabled children, *see* 20 U.S.C. §§ 1414(a)-(c), develop an IEP for each one, *see* 20 U.S.C. § 1414(d)(2), and review every IEP at least once a

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(Cont'd)
IDEA, or about $605 per student. *See* U.S. Dept. Of Educ., *Twenty-fourth Annual Report to Congress on the Implementation of the IDEA*, I-32 to I-33 (2002). This amounts to only 10.2 percent of the added costs imposed by IDEA. *See* id at I-33 n.16.

year, *see* 20 U.S.C. § 1414(d)(4). Each IEP must include an assessment of the child's current educational performance, must articulate measurable educational goals, and must specify the nature of the special services that the school will provide. *See* 20 U.S.C. § 1414(d)(1)(A).

"Parents and guardians play a significant role in the IEP process." *Schaffer*, 126 S. Ct. at 532. They must be informed about and consent to evaluation of their child. *See* 20 U.S.C. § 1414(c)(3). Parents are included as members of "IEP teams." *See* 20 U.S.C. § 1414(d)(1)(B).[4] They have the right to examine any records relating to their child, and to obtain an "independent educational evaluation of the[ir] child," *see* 20 U.S.C. § 1415(b)(1), "at public expense," 34 C.F.R. § 300.502(b)(1). They must be given written prior notice of any changes in an IEP, *see* 20 U.S.C. § 1415(b)(3), and be notified in writing of the procedural safeguards available to them under the Act, *see* 20 U.S.C. § 1415(d)(1). If parents believe that an IEP is not appropriate, they may seek an administrative "impartial due process hearing." *See* 20 U.S.C. § 1415(f). School districts may also seek such hearings, as Congress clarified in the 2004 amendments. *See* S. Rep. No. 108-185, p. 37 (108th Cong. 1st Sess.) (Nov. 3, 2003). "They may do so, for example, if they wish to change an existing IEP but the parents do not consent, or if parents refuse to allow their child to be evaluated." *Schaffer*, 126 S. Ct. at 532. "As a practical matter, it appears that most hearing requests come from parents rather than schools." *See id.*

The underlying claim from which the writ stems is for tuition reimbursement for the unilateral placement of the

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4. In New York State, the "IEP Team" is called a Committee on Special Education (the "CSE"), whose members are appointed by *the board of education or trustees of the school district.* See N.Y. Educ. Law § 4402(1)(b)(1) (McKinney Supp. 2005).

student by his parents during the 1998/99 and 1999/00 school years in a private institution that predominantly services disabled students. His parents unilaterally enrolled him in the Kildonan School in Amenia, New York ("Kildonan") prior to a scheduled meeting of the CSE held on July 30, 1998. Kildonan has not been approved by NYSED to instruct student with disabilities. By letter dated September 3, 1998, the parents requested an impartial hearing to determine whether or not the District should be required to reimburse them for the costs associated with the unilateral placement along with costs associated with private speech/language therapy secured by them at their own expense during the 1997/98 school year.

III. Procedural History

Following the parents' hearing request, the District appointed an impartial hearing officer ("IHO") from a list of certified hearing officers published by NYSED. The parents were represented during the hearing by Marilyn Arons, who described herself throughout the hearing as a "non-lawyer representative." At the hearing, Ms. Arons performed many functions traditionally attributed to licensed attorneys. She made an opening statement, she conducted direct and cross examination of witnesses, she made a motion for a directed verdict, she raised objections and she prepared a post-hearing memorandum of law. After a lengthy hearing, the IHO determined that the District had not afforded the student a free appropriate public education, held that the parents appropriately placed him at Kildonan, and awarded reimbursement for Kildonan's tuition and private speech/ language therapy secured by them at their own expense during the 1997/98 school year.

With respect to due process hearings, the IDEA permits each state to determine whether it will provide a single-tier

or two-tier administrative review process. *See* 20 U.S.C. § 1415(g). New York has opted for the two-tier approach. N.Y. Educ. Law § 4404 (McKinney Supp. 2005). The District appealed the IHO's decision to the State Review Officer ("SRO"). While that appeal was pending, the parents commenced an action in the Northern District of New York which was subsequently transferred to the Southern District of New York. The parents sought an order enforcing the IHO's ruling and compelling the District to fund the student's attendance at Kildonan pending the outcome of the SRO appeal.

While the parents' case was pending before the district court, the SRO sustained the IHO's determination to award the parents tuition reimbursement for their unilateral placement of Joseph at Kildonan for the 1998/99 school year. *See Application of the Bd. of Educ. of the Arlington Cent. Sch. Dist.*, Appeal No. 99-65 (SRO Dec. 14, 1999). In light of the timing of the SRO's decision, which was rendered in excess of the thirty day timeframe set forth in 34 C.F.R. § 300.511(b) and during the middle of the 1999/00 school year, the parents amended their complaint to request declaratory and injunctive relief. Specifically, the parents asked the district court to hold that the SRO's decision on their claim for the 1998/99 school year created an agreement, by operation of 34 C.F.R. § 300.514(c), between them and the State for their son's continued placement at Kildonan for the 1999/00 school year and beyond.

On March 1, 2000, *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 86 F. Supp. 2d 354 (S.D.N.Y. 2000), the district court held that under the IDEA the District was obligated to reimburse the parents tuition from September 17, 1999 to the date of the order, and to continue to fund the tuition as long as Kildonan remained the current educational placement. The District appealed. The Second Circuit affirmed. *Murphy*

v. Arlington Cent. Sch. Dist. Bd. of Educ., 297 F.3d 195 (2d Cir. 2002).

By several letters dated January and February 2003, the parents requested that the district court order the District to pay fees and costs incurred during the course of the impartial due process hearing. Included among the parents' expenses were $29,350 in fees for the services of Ms. Arons. Omitted from the parents' January and February 2003 applications were any fees or expenses (other than mileage) for Gerald Brooks, a speech and language pathologist who evaluated the student, prepared a report of his findings and testified on the parents' behalf at the impartial hearing (23a-32a, 35a-38a). In March 2003, the District opposed the parents' application for Ms. Arons' fees, arguing in part that there is no statutory authority for payment of experts' fees.

By Memorandum Opinion and Order, dated July 22, 2003, the district court granted the parents' application in part, and denied it in part. *See Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, No. 99 Civ. 9294, 2003 WL 21694398 (S.D.N.Y. July 22, 2003). The district court reasoned that at impartial due process hearings, a party has "the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities" and that the IDEA provides that a district court, in its discretion, may award a "prevailing party" "reasonable attorneys' fees." *See Murphy*, 2003 WL 21694398 at *4 (*citing* 20 U.S.C. § 1415(d)(1) and (e)(4)(B)). In reconciling these provisions, the district court concluded that unlicensed individuals such as Ms. Arons cannot collect "attorneys' fees" for doing work similar to that of an attorney, but instead, can collect for related work as "expert consulting services." *See id.* at *4.

Rather than conduct an analysis of Ms. Arons' alleged expertise, the district court stated that it was "in general

agreement" with the district courts in *Borough of Palmyra Bd. of Educ. v. R.C.*, No. 97 Civ. 6119, 31 IDELR ¶ 3 (D.N.J. July 29, 1999) and *Connors v. Mills*, 34 F. Supp. 2d 795 (N.D.N.Y. 1998) that Ms. Arons is an expert and that, insofar as the parents' claim for Ms. Arons' fees was allowable, it was "subject to substantial discount." *See Murphy*, 2003 WL 21694398 at *8. The district court found that Ms. Arons' December 20, 2002 and March 18, 2003 "certifications" of services allegedly rendered were sufficient records of the time she spent on the matter, notwithstanding the fact that Ms. Arons kept no contemporaneous time records.

The district court then determined that Ms. Arons' fees for consulting serves were compensable from the time the parents requested an impartial hearing on September 3, 1998, until the parents became "prevailing parties" under the IDEA on March 1, 2000, the date of the district court's ruling in their favor. *Id.* at *9.

It then considered which of Ms. Arons' services, within these dates, were compensable under the IDEA based on the standards set forth in *Palmyra* and *Conners*. *See Murphy*, 2003 WL 21694398 at *9-*10. The district court conducted no independent inquiry of a "market rate" for Ms. Arons' services. Instead, it relied solely on the *Palmyra* court's finding that the market rate for Ms. Arons' services is $200 per hour. *See Murphy*, 2003 WL 21694398 at *10. It determined that the parents' claims for mileage costs due to Ms. Arons' lack of a driver's license were not compensable. *See id.* at *11. Because the parents had not yet paid Ms. Arons, it ruled that an award of pre-judgement interest was not warranted. *See id.* It concluded that the parents were entitled to recover $8,650 for Ms. Arons' fees from the District. *See id.*

On August 20, 2003, the District timely filed a notice of appeal from the district court's July 22, 2003 Memorandum Opinion and Order.

IV. The Second Circuit's Decision

The court of appeals affirmed. *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 402 F.3d 332, 333 (2d Cir. 2005), *cert. granted*, 126 S. Ct. 978 (2006). The court acknowledged that in *West Virginia Univ. Hosp., Inc. v. Casey*, 499 U.S. 83 (1991), this Court had held that identical language in the then-current version of 42 U.S.C. § 1988 did not authorize award of expert fees, because "there was no 'explicit statutory authority' indicating that Congress intended for that sort of fee-shifting." *Murphy*, 402 F.3d at 336 (*quoting Casey*, 499 U.S. at 87). The court found, however, that a statement in the House Conference Committee Report on IDEA's predecessor, the Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796, that "[t]he conferees intend that the term 'attorneys' fees as part of the costs' include reasonable expenses and fees of expert witnesses and the reasonable costs of any test or evaluation which is found to be necessary for the preparation of the . . . case." demonstrated that Congress intended that expert fees be compensable under IDEA. *See id.* at 336-337 (*quoting* H.R. Conf. Rep. No. 687, 99th Cong., 2nd Sess. 5 (1986)). The court of appeals concluded that this Court's reference in *Casey* to the IDEA's legislative history, in dicta in a footnote, required it to distinguish IDEA from Section 1988 as construed by *Casey*. *See Murphy*, 402 F.3d at 337 (*quoting Casey*, 499 U.S. at 92 n.5).

The court of appeals recognized that its decision in this case directly conflicts with the holdings of the Seventh and Eighth Circuits that expert fees are not compensable under IDEA, but stated that its reading of the statute and this Court's cases required it to reject those decisions and, instead,

claimed to join the Third Circuit in ruling that expert fees are compensable. *See id.* at 336 (*citing Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022 (8th Cir. 2003); *T.D. v. LaGrange Sch. Dist. No. 102*, 349 F.3d 469 (7th Cir. 2003); *Arons v. New Jersey State Bd. of Educ.*, 842 F.2d 58 (3d Cir.), *cert. denied*, 488 U.S. 942 (1988)).[5]

The court of appeals also found it "instructive" that after *Casey*, Congress amended Section 1988 to allow recovery of expert fees in civil rights actions, but took no "similar action with respect to the IDEA." *See id.* The court "believe[d] it reasonable to infer that Congress, on the basis of the Supreme Court's decision in *Casey*, saw no need to amend the IDEA because the Court had recognized that, in enacting the IDEA, Congress had sufficiently indicated in the committee report that prevailing parties could recover expert fees under the Act." *Id.* In addition, the court reasoned, awarding expert fees was consistent with IDEA's purpose of ensuring that all children with disabilities obtain a free appropriate public education. *See id.* at 338.

After the Second Circuit issued its decision in this case, a divided panel of the District of Columbia Circuit held – in accordance with the rule of the Seventh and Eighth Circuits – that IDEA does not authorize an award of expert fees to prevailing parties. *See Goldring v. District of Columbia*, 416 F.3d 70, *reh'g en banc denied* (D.C. Cir. Nov. 10, 2005). In so holding, the District of Columbia Circuit specifically acknowledged the Second Circuit's contrary ruling in this case and the conflict in the circuits. *See id.* at 73.

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5. While the Second Circuit interpreted the Third Circuit's decision in Arons as holding that expert fees are recoverable under the IDEA's fee-shifting provision, *see Murphy*, 402 F.3d at 338-339, the Third Circuit did not directly address whether IDEA itself authorizes the award of such fees to prevailing parties, *see Arons*, 842 F.2d at 62.

SUMMARY OF THE ARGUMENT

Expert witness fees are not recoverable under the IDEA, which provides only for shifting of "reasonable attorneys' fees as part of the costs" associated with a proceeding under the Act. The IDEA contains no explicit statutory authority for the recovery of expert fees. The IDEA is legislation that arises from Congress' spending power and its terms must be narrowly construed and read according to their plain meaning. The Second Circuit erred in relying on one sentence of a conference committee report to construe the IDEA as providing for the recovery of expert fees. Contrary to the Second Circuit's reasoning, this Court's analysis in *Casey* does not authorize a departure from the language of the statute. The majority of the circuits do not construe the plain meaning of the IDEA's attorneys' fees provision as allowing for expert fees, given the absence of explicit statutory authority for such relief. Public policy does not require the recovery of expert fees in IDEA proceedings.

ARGUMENT

I. The Second Circuit erred in holding that the IDEA's attorneys' fees shifting provision authorizes a court to award expert fees to the parents of a child with a disability who is a prevailing party under the IDEA.

IDEA is Spending Clause legislation that conditions federal financial assistance on compliance with the Act's requirements. *See Schaffer*, 126 S. Ct. at 531-532; *Cedar Rapids Comm. Sch. Dist. v. Garret F.*, 526 U.S. 66, 83 (1999) (Thomas, J., joined by Kennedy, J., dissenting) ("because IDEA was enacted pursuant to Congress' spending power, our analysis of the statute in this case is governed by special rules of construction."); *Rowley*, 458 U.S. at 190 n.11 & 204 n.26 (1982). One special rule of construction of a Spending Clause statute is that the Court "must interpret Spending

Clause legislation narrowly, in order to avoid saddling the States with obligations that they did not anticipate." *See Garret F.*, 526 U.S. at 84 (Thomas, J., joined by Kennedy, J., dissenting).

The IDEA does not authorize prevailing parents to recover from public school districts the costs of experts whom parents have secured to participate in litigation over IEPs. Expert witness fees are not recoverable under the IDEA, which provides explicit statutory authority only for shifting of "reasonable attorneys' fees as part of the costs" associated with a proceeding under the Act. Language of statutes emanating from Congress' Spending Power must be construed strictly according to the plain meaning of their terms to avoid saddling the States with obligations that they did not anticipate.

The Second Circuit erred first by looking at legislative intent, in the absence of any ambiguity, to determine the meaning of a statute and then by concluding that Congress intended to authorize reimbursement of expert fees in IDEA actions based on a single sentence in the 1986 House Conference Report accompanying the IDEA. While this sentence states that the "conferees intend" to permit expert fees, this legislative history cannot trump the plain language of the statute that Congress enacted into law, which is silent on the issue of expert fees. The legislative history of the IDEA does not unambiguously demonstrate that Congress expressly intended to allow, rather than prevent, prevailing parties to recover the costs of experts. The Second Circuit failed to consider competing legislative history that suggests an intentional omission by Congress of expert fees from recoverable costs under the IDEA, *viz.*, that both the Senate and the House considered and rejected draft bills that would have explicitly provided for expert fees under the IDEA's attorneys' fees provision. *See footnote 10, supra pp. 29-30.*

This Court's analysis of Section 1988's attorneys' fee provision in *Casey*, which discussed in a footnote the IDEA conference report sentence, does not authorize a departure from the language of the statute. In *Casey*, identical language to that found in the IDEA was deemed not to include expert fees. The IDEA is not different from ordinary fee-shifting statutes.

The Second Circuit also erred in making a negative inference from congressional inaction following *Casey*. If congressional intent may be gleaned from legislative inaction, then it is more likely that Congress intended to omit expert fees from the IDEA by declining to amend the IDEA's attorneys' fees provision in the same manner in which it amended Section 1988 following the *Casey* decision, i.e., to expressly provide for the recovery of expert fees.

Every circuit court of appeals that has directly addressed the issue, other than the Second Circuit, has concluded that expert fees are not recoverable under the IDEA given the absence of explicit statutory authorization for the shifting of the cost of expert fees onto the losing party, *see Goldring*, 416 F.3d at 74; *Neosho*, 315 F.3d at 1031; *Missouri Dep't of Elementary and Secondary Educ. v. Springfield R-12 Sch. Dist.*, 358 F.3d 992, 1002 (8th Cir. 2004); *T.D.*, 349 F.3d at 482. This Court should endorse the majority view and reverse the Second Circuit's holding below.

Public Policy does not require recovery of expert fees in IDEA proceedings. The promise of a free appropriate public education is not dependent on parents' ability to recover expert fees. A holding that the IDEA authorizes the award of expert fees would violate Congress' intent to focus resources on teaching and learning while reducing litigation-related costs.

A. The IDEA contains no explicit statutory authority for the recovery of expert fees.

"Fee-shifting provisions in federal statutes are not uncommon – 'numerous federal statutes allow courts to award attorney's fees.'" *A.R. v. New York City Dep't of Educ.*, 407 F.3d 65, 73-74 (2d Cir. 2005) (*quoting Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Res.*, 532 U.S. 598, 600 (2001)). "Unlike in England, such 'costs' generally had not included attorneys' fees; under the 'American Rule,' each party had been required to bear its own attorneys' fees." *Marek v. Chesny*, 473 U.S. 1, 3 (1985). "The 'American Rule' as applied in federal courts, however, had become subject to certain exceptions by the late 1930s." *Marek*, 473 U.S. at 3. Some of these exceptions had evolved as a product of the "inherent power in the courts to allow attorneys' fees in particular situations." *See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 260-262 (1975). "But most of the exceptions were found in federal statutes that directed courts to award attorneys' fees as part of costs in particular cases." *Marek*, 473 U.S. at 3.

The IDEA grants courts discretionary power to "award reasonable attorneys' fees as part of the costs to the parents of a child with a disability who is the prevailing party." 20 U.S.C. § 1415(i)(3)(B). "This language assumes, by its construction, that costs include something more than attorneys' fees but the IDEA does not specifically authorize an award of costs or define what items are recoverable as costs." *Neosho*, 315 F.3d at 1031 (internal quotation omitted).

Under Rule 54(d)(1), the prevailing party is presumed to be entitled to an award of costs. *See* Fed. R. Civ. P. 54(d)(1). The term "costs" in Rule 54(d)(1) is a term of art. *See* 10 Moore's Federal Practice, §§ 54.103(1), (3)(a) (Matthew Bender 3d ed.). "Absent a specific definition of costs, [courts] look to the general provisions providing for

the taxation of costs in federal courts as a matter of course." *Neosho*, 315 F.3d at 1031. Rule 54(d)(1) does not provide any authority for taxing items not specifically permitted by 28 U.S.C. § 1920. *See Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 441-445 (1987).

"Title 28 U.S.C. § 1920(3) provides for payment of witness fees, and 28 U.S.C. § 1821(b) limits that payment to a $40 per day attendance fee." *See Crawford*, 482 U.S. at 441-445. "These sections, read together, permit district courts to tax certain fees as costs against the non-prevailing party." *See Brillon v. Klein Indep. Sch. Dist.*, 274 F. Supp. 2d 864, 871-872 (S.D. Tex. 2003), *aff'd in part & rev'd in part*, 100 Fed. Appx. 309 (5th Cir. 2004). "They do not provide for an additional tax for expert fees." *See id.*

This Court has held that "when a prevailing party seeks reimbursement for fees paid to its own expert witnesses, a federal court is bound by the limit of § 1821(b), absent contract or explicit statutory authority to the contrary." *Crawford*, 482 U.S. at 439. That is, the actual expenses incurred by the party for the witness's testimony are not recoverable as costs. *See id.* at 437. There is "no authority to support the counter-intuitive assertion that the term 'costs' has a different and broader meaning in fee-shifting statutes than it has in the costs statutes that apply to ordinary litigation." *Casey*, 499 U.S. at 87 n.3. There is no doubt that Congress knows how to specify a shifting of expert witness fees. *See id.* at 88-89 (noting that "at least 34 statutes in 10 different titles of the United States Code explicitly shift attorney's fees and expert witness fees"), *superseded by statute*, 42 U.S.C. § 1988(c) (2003) (explicitly providing for an award of expert witness fees).

The Second Circuit's first, and primary, error was its failure to address the lack of "explicit statutory authority"

for shifting of expert witness fees. As cited above, the IDEA's fee provision states:

> In any action or proceeding brought under this section, the court, ~~in its discretion~~, may award *reasonable attorney's fees as part of the costs* to the parents of a child with a disability who is the prevailing party.

20 U.S.C. § 1415(i)(3)(B) (emphasis added).

Had the Second Circuit considered whether or not the IDEA provides "explicit statutory authority" for recovery of expert witness fees, it could not have rationally concluded *other* than that the IDEA does not authorize the recovery of expert witness fees beyond the amounts provided in 28 U.S.C. § 1821(b). *See Goldring*, 416 F.3d at 74; *T.D.*, 349 F.3d at 481-482; *Neosho*, 315 F.3d at 1031-33. The text of the IDEA's fee-shifting provision conclusively demonstrates that Congress authorized reimbursement of only attorneys' fees.[6] This conclusion flows not simply from the plain meaning of the statute but also from the cannon of statutory construction, *expressio unius est exclusio alterius*, to expressly include one or more of a class in a written instrument must be taken as an exclusion of all others. *See TRW, Inc. v. Andrews*, 534 U.S. 19, 29 (2001).

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6. That conclusion is bolstered by Section 1415(i)(3)(F), which directs a court to reduce "the amount of attorneys' fees awarded under this section" whenever it finds certain specified facts that are explicitly directed to "attorneys" and "legal services." *See* 20 U.S.C. § 1415(i)(3)(F). If Congress intended Section 1415(i)(3)(F) to authorize the reimbursement of expert fees as well as attorneys' fees, there is no reason to believe that Congress would have gone to such great lengths in Section 1415(i)(3)(F) to identify circumstances in which an award of attorneys' fees should be reduced but have remained silent as to expert fees.

1. A statute emanating from Congress' Spending Power must be construed narrowly.

The Constitution empowers Congress to "lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States." U.S. Const. Art. I, § 8, cl. 1. "Incident to this power, Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power 'to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives'." *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (*quoting Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980)).

The Court has repeatedly emphasized that, when Congress places conditions on the receipt of federal funds under the Spending Clause, "it must do so unambiguously." *See, e.g., Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 17 (1981); *see also New York v. United States*, 505 U.S. 144, 158 (1992); *South Dakota*, 483 U.S. at 207; *Rowley*, 458 U.S. at 190 n.11. This is because a law that "condition[s] an offer of federal funding on a promise by the recipient . . . amounts essentially to a contract between the Government and the recipient of funds." *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998). As such, "[t]he legitimacy of Congress' power to legislate under the spending power . . . rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it." *Pennhurst*, 451 U.S. at 17. "It follows that [the Court] must interpret Spending Clause legislation narrowly, in order to avoid saddling the States with obligations that they did not anticipate." *Garret F.*, 526 U.S. at 84 (Thomas, J., joined by

Kennedy, J., dissenting). The Second Circuit's approach turns this Spending Clause presumption on its head.

Applying a "plain meaning interpretation," *see Marek*, 473 U.S. at 9, to the IDEA's attorneys' fees provision will not "produce absurd results," *cf. id.* at 21 (Brennan, J., jointed by Marshall, J., and Blackmun, J., dissenting), since "Congress . . . also took steps to limit the fiscal burdens that States must bear in attempting to achieve [the] laudable goal [of educating handicapped children with nonhandicapped children whenever possible]," *see Garret F.*, 526 U.S. at 84 (Thomas, J., joined by Kennedy, J., dissenting). These steps included requiring States to provide an education that is "appropriate" rather than one which purportedly maximizes the potential of disabled students, *see* 20 U.S.C. § 1400(c); *Rowley*, 458 U.S. at 200, recognizing that placement in the public school environment is not always possible, *see* 20 U.S.C. § 1412(a)(5), placing limitations on tuition reimbursement due to lack of notice or unreasonable conduct by parents, *see* 20 U.S.C. § 1412(a)(10)(A)(iii), and prohibiting the recovery of attorneys' fees in certain circumstances, *see* 20 U.S.C. § 1415(i)(3)(D).

For this reason, the Court has previously recognized that Congress did not intend to "impos[e] upon the States a burden of unspecified proportions and weight" in enacting IDEA. *See Rowley*, 458 U.S. at 176. These federal concerns require the Court to interpret IDEA's attorneys' fees provision as exclusive of experts fees. The Second Circuit's approach to the contrary, *see Murphy*, 402 F.3d at 337-338, "disregards the constitutionally mandated principles of construction applicable to Spending Clause legislation and blindsides unwary States with fiscal obligations that they would not have anticipated," *see Garret F.*, 526 U.S. at 85 (Thomas, J., joined by Kennedy, J., dissenting).

B. The Second Circuit erred in relying on legislative history to construe the IDEA as providing for the recovery of expert fees.

Proper respect for the legislative powers vested in Congress "implies that statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *United States v. Albertini*, 472 U.S. 675, 680 (1985). It is a basic principle of statutory interpretation that the Court need not consider the legislative history of a statute unless the plain language of the statute is ambiguous. *See, e.g., Burlington Northern R.R., Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987) ("Unless exceptional circumstances dictate otherwise, when we find the terms of a statute unambiguous, judicial inquiry is complete"). "The mere fact that statutory provisions conflict with language in the legislative history is not an exceptional circumstance permitting a court to apply the legislative history rather than the statute." *United States v. Erikson P'ship*, 856 F.2d 1068, 1070 (8th Cir. 1988). "A sentence in a conference report cannot rewrite unambiguous statutory text with a Supreme Court-tested and -approved meaning." *See Goldring*, 416 F.3d at 75.

The purpose of a statute includes not only what it sets out to change, but also what it resolves to leave alone. *See Rodriguez v. United States*, 480 U.S. 522, 525-526 (1987). "The best evidence of that purpose is the statutory text adopted by both Houses of Congress and submitted to the President." *Casey*, 499 U.S. at 98. "Where that contains a phrase that is unambiguous – that has a clearly accepted meaning in both legislative and judicial practice – we do not permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process." *Id.*; *see also United States v. Ron Pair Enter.*, 489 U.S. 235, 241 (1989) ("[W]here, as here, the

statute's language is plain, 'the sole function of the court is to enforce it according to its terms'") (*quoting Caminetti v. United States*, 242 U.S. 470, 485 (1917)).

"When the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms." *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004) (internal quotation marks omitted); *see also Ratzlaf v. United States*, 510 U.S. 135, 147-148 (1994) (court should "not resort to legislative history to cloud a statutory text that is clear"); *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 808-809 (1989) ("Legislative history is irrelevant to the interpretation of an unambiguous statute."); Oliver Wendell Holmes, *Collected Legal Papers* at 207 (1920) ("We do not inquire what the legislature meant; we ask only what the statute means.").[7]

"Congress could have made explicit in the statutory language of the IDEA that attorneys' fees include expert fees." *Goldring v. District of Columbia*, No. 02 Civ. 1761, slip op. at 6 (D.D.C. July 21, 2004).[8] "Yet, the fee shifting statute at

7. While "[r]eference to statutory design and pertinent legislative history may often shed new light on congressional intent, notwithstanding statutory language that appears superficially clear," *Natural Res. Def. Council v. Browner*, 57 F.3d 1122, 1127 (D.C. Cir. 1995); *accord, e.g., Sierra Club v. EPA*, 353 F.3d 976, 988 (D.C. Cir. 2004); *Consumer Elec. Ass'n v. FCC*, 347 F.3d 291, 298 (D.C. Cir. 2003), the Court does not confront "superficially clear" language here. In *Casey*, this Court said that the expression "reasonable attorneys' fees as part of the costs" is clear, not just superficially so. *See Casey*, 499 U.S. at 98-99.

8. Indeed, Congress in 2004, considered but did not adopt a bill (the Fairness and Individual Rights Necessary to Ensure a Stronger Society: Civil Rights Act of 2004) that would have amended IDEA and numerous other civil rights statutes to explicitly authorize

(Cont'd)

issue here provides no explicit authorization of expert witness fees." *Neosho*, 315 F.3d at 1032. Instead, the IDEA states only that courts "may award reasonable attorneys' fees as part of the costs to the parents of a child with a disability who is the prevailing party." 20 U.S.C. § 1415(i)(3)(B). That language parallels the language of Section 1988 ("reasonable attorneys' fees as part of the costs") that the Supreme Court concluded in *Casey* did not include expert fees within an award. *See Casey*, 499 U.S. at 102. "The statutory language of the IDEA, like Section 1988, is not ambiguous, and therefore legislative history is not relevant to its interpretation." *Goldring v. District of Columbia*, No. 02 Civ. 1761, slip op. at 6 (D.D.C. July 21, 2004). "Even though a single passage in one piece of the legislative history may indicate otherwise, without occasion to consult such legislative history, it does not govern here."[9] *Id.* "Consistent

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(Cont'd)
an award of expert fees. *See* S. 2088, 108th Cong. 2d Sess. (2004); H.R. 3809, 108th Cong. 2d Sess. (2004). The bill explained that its purpose was, *inter alia*, "to allow recovery of expert fees by prevailing parties under civil rights fee-shifting statutes" and that this purpose was "made necessary by the decision of the Supreme Court in [*Casey*]." *See* S. 2088 at §§ 521, 522(1). Specifically, it would have provided that "Section 615(i)(3)(B) of the Individuals with Disabilities Education Act (20 U.S.C. § 1415(i)(3)(B)) is amended by inserting '(including expert fees)' after 'attorneys' fees.'" S. 2088 at § 523(e). If, as the Second Circuit posited below, Congress already allowed for the recovery of expert fees under IDEA's fee-shifting provision, then Congress would have had no need to include IDEA among the civil rights statutes to be amended by the bill. That bill expired at the end of the 108th Congress.

9. If the congressional conferees intended that the IDEA fee provision encompass expert fees as the Second Circuit suggests, they neglected to provide language in the conference bill that would have accomplished this purpose. Any argument that a court should correct a committee oversight "profoundly mistakes" the judicial "role." *See Casey*, 499 U.S. at 100.

with the reasoning in *Casey*, . . . Congress could have included expert costs in attorneys' fees by specifically stating so on the face of the statute." *Goldring v. District of Columbia*, No. 02 Civ. 1761, slip op. at 6 (D.D.C. July 21, 2004). "The fact that Congress did not do so is significant and determinative."[10] *Id.*

C. *Casey* does not authorize departure from the language of the statute.

The Second Circuit erred in construing dicta in *Casey*, which commented on some of the legislative history behind

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10. Other legislative history of the 1986 amendment to the IDEA supports the conclusion that Congress purposefully declined to include expert costs in attorneys' fees. Both the Senate and House bills at various times contained language that would have explicitly provided for expert fees. The report accompanying S. 415, the Senate bill to add a fee provision to the IDEA, discloses that the bill as reported out by the Senate Committee on Labor and Human Resources contained the following provision: "[T]he court may, in its discretion, award a reasonable attorney's fees, reasonable witness fees, and other reasonable expenses of the civil action, in addition to the costs to" a prevailing parent. *See* S. Rep. No. 99-112 at 7 (99th Cong. 1st Sess.) (July 25, 1985). On the floor, however, the Senate approved Amendment No. 561 that did not mention witness fees and other expenses, but only attorneys' fees and costs. *See* 131 Cong. Rec. No. 104 S10396, S10465 (99th Cong. 1st Sess.) (July 30, 1985).

In turn, the House's original bill, H.R. 1523, authorized the courts to "award reasonable attorneys' fees expenses, and costs." The "expenses" language was carried forward in the bill as reported out by the House Committee on Education and Labor, and the House Committee Report stated that this language encompassed expert fees. *See* H.R. Rep. No. 99-296 at 1, 6 (99th Cong. 1st Sess.) (Oct. 2, 1985). This language was abandoned, however, in the bill enacted by both Houses of Congress after debates in which no one suggested that the language Congress enacted – "attorneys' fees as part of the costs" – encompassed expert fees. *See* 132 Cong. Rec. No. 93 S9277 (99th Cong. 2d Sess.) (July 17, 1986); 132 Cong. Rec. No. 97 H4833 (99th Cong. 2d Sess.) (July 24, 1986); 132 Cong. Rec. No. 97 H4841 (99th Cong. 2d Sess.) (July 24, 1986).

the IDEA's attorneys fees provision, *see Casey*, 499 U.S. at 91 n.5, as authority to depart from the text of the statute and conclude that Congress intended to allow prevailing parties to recover the costs of experts, *see Murphy*, 402 F.3d at 337; *see also Brillon*, 274 F. Supp. 2d at 872 (similarly reading *Casey* as authorizing courts to depart from the text of IDEA's attorneys' fees provision based on legislative history).[11] "*Casey* in no way endorsed the proposition that attorneys' fees include expert fees under the IDEA or that the legislative history of the IDEA is even relevant to the consideration of whether expert fees are recoverable under the IDEA." *Goldring v. District of Columbia*, No. 02 Civ. 1761, slip op. at 5 (D.D.C. July 21, 2004), *aff'd*, 416 F.3d 70, 75, *reh'g en banc denied* (D.C. Cir. Nov. 10, 2005). "If the [*Casey*] Court had found this one sentence of legislative history compelling, it would have included section 1415 in its catalogue of statutes authorizing a prevailing party to shift attorneys' fees as well as expert fees." *Goldring*, 416 F.3d at 75-76. The Second Circuit's analysis of the fifth footnote in Casey construes the word "apparent" as meaning "obvious" (e.g.,

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11. The Court's fifth footnote in *Casey* states in full:

> WYUH cites a House Conference Committee Report from a statute passed in 1986, stating: "The conferees intend the term 'attorneys' fees as part of the costs' include reasonable expenses and fees of expert witnesses and the reasonable costs of any test or evaluation which is found to be necessary for the preparation of the . . . case." *See* H.R. Conf. Rep. No. 99-687, p.5 (1986) (discussing the Handicapped Children's Protection Act of 1986, 20 U.S.C. § 1415(3)(4)(B)). In our view this undercuts rather than supports WVUH's position: The specification would have been quite unnecessary if the ordinary meaning of the term included those elements. The statement is an apparent effort to depart from ordinary meaning and to define a term of art.

Casey, 499 U.S. at 91, n.5.

an obvious effort to depart from ordinary meaning and define a term of art) when it is equally possible to be read as suggesting something that may not be borne out by more rigorous analysis (e.g., an illusory effort). *See* Merriam-Webster Online for variations of meaning for "apparent," *available at http://www.m-w.com/dictionary/apparent* (last visited February 20, 2006).

In *Casey*, this Court considered whether the Civil Rights Attorneys' Fees Awards Act, 42 U.S.C. § 1988, gave authority to shift expert fees. *See Casey*, 499 U.S. at 84. The former version of Section 1988 contained a fee-shifting provision, almost identical to that in the IDEA (then named the Handicapped Children's Protection Act), allowing "the prevailing party . . . a reasonable attorney's fee as part of costs." *See* 42 U.S.C. § 1988(b), *amended by* 42 U.S.C. § 1988(c) (2003). The *Casey* Court held that this language was not an explicit statutory authorization that allowed shifting of expert witness fees. *See Casey*, 499 U.S. at 102.

In response to an argument that the legislative history of the IDEA provided an indication that Congress intended to include expert fees in "attorneys' fees as part of costs" under Section 1988, the Court observed, in a footnote, that a Conference Committee Report on the IDEA stated that "[t]he conferees intend that the term 'attorneys' fees as part of the costs' include reasonable expenses and fees of expert witnesses and the reasonable costs of any test or evaluation which is found to be necessary for the preparation of the . . . case." *See id.* at 91 n.5 (*quoting* H.R. Conf. Rep. No. 99-687 at 5 (1986), *reprinted in* 1986 U.S.C.C.A.N. 1798, 1808). The Court, in dicta, characterized this portion of the IDEA's legislative history as "an apparent effort to depart from ordinary meaning and to define a term of art," noting that "the specification would have been quite unnecessary if the ordinary meaning of the term included those elements." *See id.*

According to the Second Circuit, this dicta compelled it to conclude that the IDEA's attorneys' fees provision includes expert witness fees. *See Murphy*, 402 F.3d at 337. However, "this 'apparent effort' to define a term of art in legislative history . . . is not the kind of 'explicit statutory' authorization the Supreme Court said in *Crawford* was necessary to exceed the limitations of the general costs statutes." *Neosho*, 315 F.3d at 1032. *Casey* merely referenced the legislative history of the IDEA as an example of the explicit distinguishing of attorneys' fees from expert fees by Congress, not as an endorsement that attorneys' fees include expert fees under the IDEA. *See Goldring v. District of Columbia*, No. 02 Civ. 1761, slip op. at 5 (D.D.C. July 21, 2004).

> While it may be ironic that the legislative history of the IDEA was used as an example in *Casey* of a specification that attorneys' fees include expert fees, it is not inconsistent or contradictory . . . to conclude nevertheless that, according to the logic of *Casey* and governing rules of statutory interpretation, the IDEA's statutory language is clear and does *not* include expert fees within recoverable attorneys' fees.

Id. (emphasis in original).

The Second Circuit misconstrued this Court's citation to the House Conference Report in *Casey* as an endorsement of a method of statutory interpretation it has consistently rejected. The Second Circuit's reading subsumes that the plain meaning of a statutory precept, a meaning consistent with judicial and legislative use, can be set aside by a comment in the Conference Report. The principal purpose of the footnote was not to rule on the efficacy of alleged congressional intent to depart from ordinary meaning and define a term of art, but to point out to the appellant in *Casey* that its citation to the House Conference Report undercut its

argument that experts' fees were ordinarily included under "attorneys' fees" as "costs."

D. The majority view does not construe the plain meaning of the IDEA's attorneys' fees provision as allowing for expert fees, given the absence of explicit statutory authority for such relief.

The majority view on whether Section 1415 "enables a prevailing party to recover expert fees as part of his costs" was most recently articulated by the District of Columbia Circuit in *Goldring*. The court in *Goldring* acknowledged the conflict among the circuits on this issue and expressly considered and rejected the reasoning and holding of the Second Circuit in this case. *See Goldring*, 416 F.3d at 73. Indeed, in rejecting the Second Circuit's approach, the court stated that

> [The] correct decision does not seem to us to be difficult to reach, for the Supreme Court has stated in fairly unequivocal terms that language nearly identical to that used in section 1415 is unambiguous and, more to the point, does not allow a prevailing party to shift his expert fees.

See Goldring, 416 F.3d at 73.

The District of Columbia Circuit reasoned that its conclusion "flows directly from the application of two Supreme Court decisions," namely, *Crawford* and *Casey*. *See Goldring*, 416 F.3d at 74 (citation omitted). As the District of Columbia Circuit explained, *Crawford* held that, in awarding fees to the prevailing party for expert services, a court is limited to the costs allowed by 28 U.S.C. § 1821(b), "absent contract or explicit statutory authority to the contrary." *See id.* at 73 (*citing Crawford*, 482 U.S. at 439).

Casey, in turn, held that language materially identical to IDEA's fee-shifting provision contained in Section 1988 "contains no such 'explicit statutory authority to the contrary.' " *See Goldring*, 416 F.3d at 73 (*quoting Casey*, 499 U.S. at 86).

Accordingly, the court in *Goldring* concluded that the logic of *Crawford* and *Casey* controls whether expert fees are recoverable under IDEA:

> [B]ecause section 1415 and the version of section 1988 construed in *Casey* contain materially identical language and *Casey* held that section 1988's language does not enable a prevailing party to shift his expert fees, we cannot but conclude that section 1415 does likewise. That is the end of the matter for us.

Goldring, 416 F.3d at 74.

In so holding, the court emphatically refused to alter its interpretation on the basis of the conference report accompanying IDEA's fee-shifting provision." *Id.* (*citing* H.R. Conf. Rep. No. 687, 99th Cong. 2d Sess. 5 (1986)). The court explained that "[a] sentence in a conference report cannot rewrite unambiguous statutory text." *Goldring*, 416 F.3d at 75.

The Eighth Circuit took the same approach two years earlier in *Neosho*. It upheld the district court's refusal in that case to award expert fees under the IDEA. The court explained that the "'apparent effort' to define a term of art in the legislative history [was] an unsuccessful one" because Congress had not engaged in the sort of "'explicit statutory' authorization" required under *Crawford* to "exceed the limitations of the general costs statutes." *See Neosho*, 315 F.3d at 1032. The court also explained that "costs" "is an ordinary term with which federal judges are well acquainted"

and that "[a]bsent a specific definition of costs" in the statutory text, courts must "look to the general provisions providing for the taxation of costs in federal courts as a matter of course." *Neosho*, 315 F.3d at 1031.

The Seventh Circuit in *T.D.* expressly "agree[d] with the Eighth Circuit's reasoning and conclusion" in *Neosho*. *See T.D.*, 349 F.3d at 481. It too held that, under *Crawford* and *Casey*, an "explicit statutory authorization was necessary to allow courts to exceed the limitations under 28 U.S.C. § 1821 and § 1920," and that no authorization was present in the IDEA. *See id.* at 482. The court similarly refused to find such authorization in the legislative history of IDEA's fee-shifting provision. *See T.D.*, 349 F.3d at 482.

E. Public policy does not require recovery of expert fees in IDEA proceedings.

The Second Circuit correctly noted that "a prevailing parent in an IDEA case . . . can collect neither compensatory damages, monetary relief, nor punitive damages; rather, their relief rests solely in the appropriate education of their child." *See Murphy*, 402 F.3d at 338; *see also Thompson v. Board of Special Sch. Dist. No. 1*, 144 F.3d 574, 580 (8th Cir. 1998). The Second Circuit reasoned that "absent a fee shifting provision that allows for the recovery of appropriate expert fees, most parents with children with disabilities would have difficulty pursuing their case," *see Murphy*, 402 F.3d at 338, "thereby diminishing their ability to protect their [children's] rights to a free appropriate public education designed to meet their unique needs," *see Brillon*, 274 F. Supp. 2d at 872.[12]

12. While the Second Circuit notes, *en passant*, that "expert testimony is often critical in IDEA cases, which are fact-sensitive inquires," *see Murphy*, 402 F.3d at 338, it is undisputed that Ms. Arons provided no expert testimony during the underlying impartial hearing.

This reasoning is flawed for two reasons: (1) Congress has already imposed painstakingly detailed mandatory obligations on public school districts to notify and educate parents about their legal rights and to shepherd them through the IDEA's administrative process which "level[s] the playing field," *see Weast v. Schaffer*, 377 F.3d 449, 453 (4th Cir. 2004), *aff'd*, 546 U.S. –, 126 S. Ct. 528 (2005) and (2) it ignores that one of the goals of the IDEA, and a key objective of the 2004 Amendments to IDEA, is to reduce the litigation costs for schools under the Act, *see Schaffer*, 126 S. Ct. at 535 (discussing the IDEIA).

1. The promise of a free appropriate public education is not dependent on parents' ability to recover expert fees.

School district may have an advantage in information and expertise, but Congress addressed this when it obligated schools to safeguard the procedural rights of parents and to share information with them. *See School Comm. of Burlington v. Department of Educ.*, 471 U.S. 359, 368 (1985). As noted above, parents have the right to review all records that the school possesses in relation to their child. *See* 20 U.S.C. § 1415(b)(1). They also have the right to an "independent educational evaluation of the[ir] child." *See id.* The regulations clarify this entitlement by providing that a "parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency." *See* 34 C.F.R. § 300.502(b)(1). "IDEA thus ensures parents access to an expert who can evaluate all the materials that the school must make available, and who can give an independent opinion." *Schaffer*, 126 S. Ct. at 536. "They are not left to challenge the government without a realistic opportunity to access the necessary evidence, or without an expert with the firepower to match the opposition." *Id.*

Additionally, in 2004, Congress added provisions requiring school districts to answer the subject matter of a complaint in writing, and to provide parents with the reasoning behind the disputed action, details about the other options considered and rejected by the IEP team, and a description of all evaluations, reports, and other factors that the school used in coming to its decision. *See* IDEIA at § 615(c)(2)(B)(i)(I). Prior to a hearing, the parties must disclose evaluations and recommendations upon which they intend to rely. *See* 20 U.S.C. § 1415(f)(2). "IDEA hearings are deliberately informal and intended to give ALJs the flexibility that they need to ensure that each side can fairly present its evidence." *Schaffer*, 126 S. Ct. at 536. "IDEA, in fact, requires state authorities to organize hearings in a way that guarantees parents and children the procedural protections of the Act." *Id.* at 536-537. Finally, and perhaps most importantly, parents may recover attorneys' fees if they prevail. *See* 20 U.S.C. § 1415(i)(3)(B). "These protections ensure that the school bears no unique informational advantage," *Schaffer*, 126 S. Ct. at 537, which compels recovery of expert fees for prevailing parents.

2. A holding that the IDEA authorizes the award of expert fees would violate Congress' intent to focus resources on teaching and learning while reducing litigation-related costs.

Public policy does not require the Court to depart from ordinary rules of statutory interpretation given that one of the goals of the IDEA, and a key objective of the 2004 Amendments to IDEA, is to reduce the litigation costs for schools under the Act. *See Schaffer*, 126 S. Ct. at 535. Holding that the IDEA authorizes the award of expert fees would have precisely the opposite effect.

"The IDEA is silent about whether marginal dollars should be allocated to litigation and administrative expenditures or to educational services." *Schaffer*, 126 S. Ct. at 535. However, "Congress has . . . repeatedly amended the Act in order to reduce its administrative and litigation-related costs." *Id.* For example, in 1997 Congress mandated that States offer mediation for IDEA disputes.[13] *See* 20 U.S.C. § 1415(e).

One of Congress' primary aims with the 2004 Amendments was to reduce the amount of litigation and promote cooperation with respect to the adoption and implementation of IEPs. *See Schaffer*, 126 S. Ct. at 535. Congress made new findings that "[p]arents and schools should be given expanded opportunities to resolve their disagreements in positive and constructive ways," and that "[t]eachers, schools, local educational agencies, and States should be relieved of irrelevant and unnecessary paperwork burdens that do not lead to improved educational outcomes." *See* IDEIA at §§ 601(c)(8)-(9).

Specifically, the amendments strengthen the notice requirements for due process complaints, *see id.* at § 615(b)(7)(A), establish a two-year statute of limitations for such complaints, *see id.* at § 615(b)(6)(B), encourage the use of voluntary mediation, *see id.* at § 615(e), add a mandatory "resolution session" prior to any due process hearing, *see id.* at § 615(f)(1)(B), and authorize the award of attorneys' fees to the school district if a parent's complaint is frivolous or was filed for an improper purpose, *see id.* at § 615(i)(3)(B).

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13. *See* General Accounting Office, *Special Education: Numbers of Formal Disputes Are Generally Low and States Are Using Mediation and Other Strategies to Resolve Conflicts*, No. GAO 03-897, 13-14 (Sept. 2003) (finding that nearly 80% of all due process hearings nationwide under IDEA occur in just five States and the District of Columbia and that New York has the highest rate of due process hearings per 10,000 students receiving special education benefits of any State).

CONCLUSION

The judgment of the Second Circuit should be reversed. Expert witness fees are not recoverable under the IDEA, which provides only for shifting of "reasonable attorneys' fees as part of the costs" associated with a proceeding under the Act. The IDEA contains no explicit statutory authority for the recovery of expert fees. The IDEA is legislation that arises from Congress' spending power and its terms must be narrowly construed and read according to their plain meaning. The Second Circuit erred in relying on one sentence of a conference committee report to construe the IDEA as providing for the recovery of expert fees. Contrary to the Second Circuit's reasoning, this Court's analysis in *Casey* does not authorize a departure from the language of the statute. The majority of the circuits do not construe the plain meaning of the IDEA's attorneys' fees provision as allowing for expert fees, given the absence of explicit statutory authority for such relief. Public policy does not require the recovery of expert fees in IDEA proceedings. The procedural protections in the IDEA level the playing field between parents and school districts and provide for an independent evaluation at public expense, among other safeguards, to allow the parents access to expert opinion at the point where it best serves the interests of the student, the development of the IEP.

Respectfully submitted,

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IN THE

Supreme Court Of The United States

ARLINGTON CENTRAL SCHOOL DISTRICT BOARD OF EDUCATION

Petitioner,

v.

PEARL MURPHY and THEODORE MURPHY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF THE COUNCIL OF PARENT ATTORNEYS AND ADVOCATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Does the Individuals with Disabilities Education Act (the "IDEA")'s attorneys' fee shifting provision, 20 U.S.C. 1415(i)(3)(B), authorize a court to award "expert" fees to the parents of a child with a disability who is a prevailing party under the IDEA?

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I.

INTEREST OF COPAA

The Council of Parent Attorneys and Advocates, Inc. (COPAA) is an independent, nonprofit, §501(c)(3) tax-exempt organization. Its primary mission is to secure high quality educational services for children with disabilities.

COPAA is premised on the belief that the key to effective educational programs for children with disabilities is collaboration -as equals- by parents and educators.

COPAA's chief concern is that parents of children with disabilities have equal access to established legal protections by ensuring the availability and quality of legal and advocacy resources for parents of children with all types of disabilities.

It is COPAA's belief that the IDEA was enacted specifically to provide all children with disabilities equal access to education. Moreover, because the heart of the IDEA is equal access, the IDEA contains the fee-shifting provisions that are at the heart of this controversy. Without the inclusion of expert fees in authorized awards of costs, fewer parties could afford to litigate, fewer parties who justly deserve to prevail would, indeed, obtain the promised access, and the very purpose of the statute would be undermined. As the Second Circuit's decision clearly demonstrated, expert fees are within the statute's authorization and the legislative history compels their

inclusion in awards to prevailing parties. The decision of the Second Circuit must be affirmed.[1]

II.

SUMMARY OF THE ARGUMENT

The court of appeals did not err in holding that IDEA's fee-shifting provision authorizes an award of expert fees as part of the costs available to a prevailing party.

The IDEA is founded on Equal Protection principles. Equal Protection principles must, therefore, inform the spirit of any interpretation of the statute.

Importantly, and key to the Court's decision, is the fact that awards of expert fees are necessary in order to fulfill the purpose of the IDEA – to ensure that all children, including those with disabilities, have equal access to education. Equal access should not mean that only children with disabilities whose parents can afford to bear the costs of litigation may obtain the education they need and to which they are entitled; rather, equal access should mean just that, true equality of access founded upon the ability of all parents to obtain a fair result for their children.

In keeping with the purpose of providing equal educational opportunity for all, in 20 U.S.C. § 1415, Congress provided a comprehensive statutory procedural scheme within the IDEA under which parents can obtain

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[1] Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court pursuant to Supreme Court Rule 37.3(a). No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

due process if they believe their children are being denied an appropriate IEP. Congress did so, as this Court has noted, because they recognized that access to education may sometimes depend on access to the judicial system. *School Committee of the Town of Burlington, Mass. v. Dept. of Educ.*, 471 U.S. 359, 369 (1985). The statute provides for the award of costs to the prevailing parent, including attorneys' fees as an integral part of those reimbursable costs as it clearly stated in the legislative history of the act.

Because, as this Court recently ruled, parents bear the burden of proving that an appropriate IEP is not being provided for their children, and because the presentation of expert evidence is an indispensable part of the process of proof, the Court should not place its imprimatur on a system that deprives parents of the equal access to obtaining the proof which the Court itself requires.

Additionally, there is a prohibition against school boards using IDEA funds to pay attorneys fees and costs, which include expert fees. 34 C.F.R. 300.513(b)(1); 64 Fed.Reg. 12406-01, at 12515 (Mar. 12, 1999).

States have the obligation to provide a free appropriate public education, and meaningful equal access to it. If a State fails to meet its obligation, and a parent is forced to seek relief through the due process safeguards established by Congress to enforce its goals, then the Court should not accord a prevailing party an empty victory by forcing the parents to bear the costs of experts, without whose help, they would not have obtained a free appropriate public education for their children.

III.

ARGUMENT

A. IDEA's Purpose to Protect Constitutional Rights Would Be Frustrated if Expert Fees Were Not Awarded to Prevailing Parties

1. The IDEA was Enacted to Enforce the Equal Protection Clause of the Fourteenth Amendment

In order to answer the actual question at issue -- whether the IDEA's attorneys' fee shifting provisions authorize the payment of expert fees as part of the award of costs to the prevailing party -- the Court must first inquire whether such an award is necessary in order to fulfill the two primary interrelated purposes of the statute: that *all* children with disabilities have access to a free appropriate public education will be ensured and that their rights and the rights of their parents be protected. 20 U.S.C. § 1400(d)(1)(A),(B). Even the most casual inquiry demonstrates that awards of expert fees are crucial to ensuring that all children with disabilities have equal access to a free appropriate public education. As this court has observed, Congress anticipated disagreements between parents and schools over the rights of all children with disabilities to have equal access to a free appropriate public education. *Burlington,* 471 U.S. at 369. This fact and the fact "that in any disputes the school district would have a natural advantage" led Congress to "incorporate[] an elaborate set of ... 'procedural safeguards' to insure the full participation of the parents and proper resolution of

substantive disagreements." *Id.* In other words, access to justice is crucial to ensure equal access to education. And because access to justice depends on the ability to retain experts, without such awards, a substantial number of parents, by virtue of their economic status, will be unable make full use of the IDEA's procedural due process provisions in order to obtain the *free* appropriate public education the law guarantees. The dual purposes of the statute, ensuring FAPE to all children and protecting the rights of all parents, therefore, will not be served. 20 U.S.C. § 1400(d). Instead, the certain effect of a ruling excluding the award of expert fees as part of the attorneys fees allowed to prevailing parents will be to set up an impermissible class of wealthy parents of children with disabilities. That impermissible wealthy class would be able to take advantage of the IDEA's due process protections because they can afford to bear the costs of paying experts through all the levels of administrative and judicial hearings required in order to succeed in gaining an appropriate education for their children. Another class, parents without financial resources to litigate IDEA cases, will not be able to proceed because reimbursement for the costs of experts will not be available even if they do succeed. And without experts, it is impossible for any parent to successfully challenge an IEP proposed by a school board.

As the Court noted in speaking of the predecessor to the IDEA [2]:

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[2] *See* Pub. L. No. 94-142, 1975 U.S.C.A.N., 89 Stat. 773, 789. For convenience and readability, all versions of the Act will be referred to as the IDEA.

> The Act was designed to fill the need identified in the House Report – that is, to provide a "basic floor of opportunity" consistent with equal protection – neither the Act nor its history persuasively demonstrates that Congress thought that equal protection required anything more than equal access."

Board of Education of the Henrik Hudson Central School District, Westchester County, v. Rowley, 458 U.S. 176, 200, 102 S.Ct. 3034, 3048-3049 (1982). The important principle stated therein is that "equal protection requires ... equal access." *Id.*

The Court in *Rowley* acknowledged that the interpretation and requirements of the IDEA fall squarely within Fourteenth Amendment jurisprudence. *Id.* The IDEA was enacted pursuant to Congress' enforcement power under § 5 of the Fourteenth Amendment. *Dellmuth v. Muth,* 491 U.S. 223, 228, 109 S.Ct. 2397, 2400 105 L.Ed.2d 181, n.1 (1989). It is more than a simple funding statute; rather, the IDEA confers upon disabled students an enforceable substantive right to public education in participating States. *Honig v. Doe,* 484 U.S. 305, 310, 108 S.Ct. 592, 597 (1988); *A.W. v. Jersey City Public Schools,* 341 F.3d 234, 248 (3d Cir. 2003). Thus, because it is founded on equal protection principles, the IDEA fundamentally is meant to provide equal access to the entire protected class of children with disabilities, not just the wealthy and the few.

Moreover, Congress made clear that it meant to ensure equal protection for children with disabilities in enacting the law. In its findings, Congress noted:

> While States, local educational agencies, and educational service agencies are responsible for providing an education for all children with disabilities, it is in the national interest that the Federal Government have a role in assisting State and local efforts to educate children with disabilities in order to improve results for such children *and to ensure equal protection of the law.*

20 U.S.C. § 1400(c)(6) (emphasis added).

Two landmark cases, *Mills v. Board of Education of the District of Columbia,* 348 F.Supp.2d 866 (D.D.C. 1972) and *Pennsylvania Ass'n for Retarded Children v. Commonwealth*, 334 F. Supp. 1257 (E.D. Pa. 1971) and 343 F. Supp. 279 (1972) (*PARC*), set forth the foundational understanding of the Fourteenth Amendment principles on which the IDEA ultimately rests.[3] They were specifically referenced in the legislative history of, and played a significant role in the passage of the Education for All Handicapped Children Act of 1975. *Honig v. Doe,* 484 U.S. at 309, 108 S.Ct. at 597 (citing S. REP. 94-168 (1975), 6, 1975 U.S.C.C.A.N. 1425, 1430).[4] These principles are

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[3] The *Mills* and *PARC* cases influenced the understanding of this area of law which led to the reform of the EHA into the Education for All Handicapped Children Act of 1975 (EAHCA), P.L. 94-142, 89 Stat. 773, 775, which was then reinforced by the passage of the newly titled Individuals with Disabilities Education Act, P.L.101-476, § 901(a)(1) and (3), 104 Stat. 1103, 1141, 1142.

[4] Congress's stated its intent unambiguously:

> 'It is clear today that this 'right to education' is no longer in question.
> In 1954, the Supreme Court of the United States established the principle that all children be guaranteed equal educational opportunity. The Court stated: 'In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is

so embedded in present case law that many courts fail to make specific reference to them in reaching decisions over more recent controversies. These principles bear restating as they provide the necessary context and foundation on which this case must be decided. First, "the right to an education, once given, is a fundamental right,[5] therefore the defendants must show a compelling state interest in order to lawfully exclude [disabled] children." *PARC,* 343 F.Supp. at 283, n.8. Second, "[s]uch an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms." *Mills,* 348 F.Supp. at 874 (*quoting Brown v. Board of Education,* 347 US. 483, 74 S.Ct. 686, 691, 98 L.Ed. 873 (1954)).

When Congress re-authorized the IDEA in 1997, it continued to link its authority and intent to the Fourteenth Amendment noting its desire to "restate that the 'right to equal educational opportunities' is inherent in the equal protection clause of the 14th Amendment of the U.S. Constitution," and that the IDEA is founded in and secured by the 14th Amendment." S. Rep. No. 104-275, at 31 (1996). Clearly, the IDEA is a civil rights act,

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> denied the opportunity of an education. *Such an opportunity . . . is a right which must be made available to all on equal terms.*' (Brown v. Board of Education).

S. Rep. No. 94-168 (1975), 6, 1975 U.S.C.C.A.N. 1425, 1430 (emphasis added). Note that the quotation from *Brown v Board of Education* is the very one that was quoted in *Mills. See Mills,* 348 F.Supp. at 874. The same language was written into the 1975 statute, the purpose of the statute being to "assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law." Pub.L. No. 94-142 §3(a), 89 Stat. 775 (1975).

[5] This is not to say that there is a fundamental Constitutional right to education. However, once a child enters the school system, the equal access obligations of the IDEA apply.

implementing the equal rights protection clause of the Fourteenth Amendment and it places an affirmative obligation upon the States to provide children with disabilities a free and appropriate education.[6] There simply is no compelling state interest that Petitioners can articulate which will allow them to use their superior resources and access to trained educational personnel and experts to deny disabled children their right to a free appropriate public education. Yet that is the result of reading the award of expert fees out of the fee-shifting statute. There can be no equal opportunity, no equal access to a public education that is both free and appropriate unless all families with children with disabilities, rich, poor and those in the vast middle, are able to obtain that education on the same terms as the wealthy.

The doctrine of equal educational opportunity is intertwined with the equitable allocation of resources. In a like manner, equal educational opportunity as an expression of equal protection is also intertwined with due process. The *Mills* court quoted Judge Skelly Wright's definition of equal educational opportunity and its connection with due process as follows:

> The doctrine of equal educational opportunity –the equal protection clause in its application to public school education – is in its full sweep a component of due process binding on the District under the due process clause of the Fifth Amendment.

Mills, 348 F.Supp. at 875, *quoting Hobson v. Hansen,* 269 F.Supp.410, 493 (D.D.C.1967). This relationship of

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[6] *See* 143 Cong.Rec. 7925 (1997) (Sen.Harkin) and *id.* at 8187 (Sen. Lott).

allocation of resources to equal protection and due process is the connection that supports the inclusion of expert fees in attorneys' fees awards for prevailing parties under the IDEA. This is because the fee-shifting statute is part of a procedural process set up specifically to provide parents of children with disabilities with the ability to challenge schools regarding the appropriateness of the children's IEP and it is part of the inherent due process guarantees built into the IDEA.

2. IDEA's Procedural Safeguards Require the Provision of Expert Fees to Prevailing Parties

In keeping with the purpose of providing equal educational opportunity for all, in 20 U.S.C. § 1415[7], Congress provided a comprehensive statutory procedural scheme within the IDEA under which parents can obtain due process if they believe their children are being denied an appropriate IEP such as would meet the IDEA's affirmative guarantees.

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[7] Section 1415 places an affirmative burden on States to establish procedural safeguards:

> Any State educational agency, State agency, or local educational agency that receives assistance under this subchapter shall establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies.

20 U.S.C. § 1415(a).

Among the extensive procedural safeguards provided parents under the IDEA are the right to be accompanied and be advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities; present evidence and confront, cross-examine, and compel the attendance of witnesses;[8] bring a civil action once administrative remedies are exhausted,[9] and an award of attorneys' fees as part of the costs to the parent of the child with disabilities who is a prevailing party.[10]

The statute itself sets forth that right for parents to resort to experts as an integral and necessary part of the due process procedures – "the right to be accompanied and be advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities." 20 U.S.C. 1415(h)(1). Congress clearly associated advice of counsel and advice of individuals with special knowledge or training as a unified category within the same clause of the same sentence of the same due process provision. *Id.* It also provides for the award of costs to the prevailing parent, including attorneys' fees as an integral and necessary part of those due process procedures. 20 U.S.C. 1415(i)(3)(B). The importance of these rights to parents, their relation to providing FAPE to children, and their role in carrying out Congress' intent and overall scheme is clear on the record of this case. As made clear both by the prior direct association of experts with attorneys within the same statutory clause and by the legislative history of the statute,[11] the right of parents to

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[8] 20 U.S.C. 1415(h).

[9] 20 U.S.C. 1415(i)(2).

[10] 20 U.S.C. 1415(i)(3)(B).

[11] As discussed more fully below, Congress stated in its Conference Committee Report that

recoup the costs of expert fees is among the due process rights accorded to parents of children with disabilities in order to ensure that equal access is available on equal terms to all.

Quite simply,

> A finding that the prevailing party may recover expert fees is the *only way to effectuate the overall purpose of the IDEA* – to protect the rights of children with disabilities and parents of those children. To enforce these rights, children and parents must incur significant costs, not the least of which are the fees to utilize experts, who are commonly needed in IDEA cases to establish a child's learning disability. Many school districts employ child and education experts on staff. If parents were unable to recover their expert fees, they might be unable to hire their own expert to effectively challenge the school district's position, thereby diminishing their ability to protect their rights to "free appropriate public education... designed to meet their unique needs."

Brillon v. Klein Independent School District, 274 F.Supp.2d 864, 872 (S.D.Tex 2003), *rev'd on other grounds,* 100

> [t]he conferees intend that the term 'attorneys' fees as part of the costs' include reasonable expenses and fees of expert witnesses and the reasonable costs of any test or evaluation which is found to be necessary for the preparation of the parent or guardian's case in the action or proceeding, as well as the traditional costs incurred in the course of litigating a case.

H.R. Conf. Rep. 99-687, at 5 (1986), *reprinted in* 1986 U.S.C.CA.N. 1807, 1808.

Fed.Appx.309 (5th Cir. 2004) (citations omitted)(emphasis added).[12]

As a further matter, because the Court recently held that the burden of proof in IDEA cases is on the complaining party, usually the parent, *Schaeffer v. Weast*, ___ U.S. ____, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005), denying the recovery of expert fees to the prevailing party will diminish or negate their due process rights. In order to meet their affirmative burden, parents must present admissible evidence relating to technical and medical findings, a burden that is impossible to meet without an expert. The requirement for an expert for a successful case under the IDEA has been noted by many, including Justice Ginsburg in the dissent to *Schaffer:*

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[12] *See also Gross ex rel. Gross v. Perrysburg Exempted Village School Dist.* 306 F.Supp.2d 726, 739 (N.D.Ohio.2004) ("An award of expert witness fees as part of attorney fees and costs under IDEA conforms with the unique nature of IDEA proceedings. Adversarial IDEA proceedings routinely involve diagnosis of a child's disability or disabilities by one or more doctors or other experts. The parties to such proceedings rarely could conduct a thorough and complete presentation and evaluation of a child's educational needs without consulting experts as to the child's physical, mental, social, and emotional condition and educational needs."); *Pazik v. Gateway Regional School Dist.*, 130 F.Supp.2d 217, 221 (D. Mass.2001) ("The payment of expert fees is consistent with the purpose of the IDEA ... to ensure that states provide all disabled children with a "free appropriate public education." As the Supreme Court explained, the EHA "guarantees to parents the right to participate in the development of an [IEP] for their handicapped child, and to challenge the appropriateness of their child's IEP in an administrative hearing with subsequent judicial review." *Id. (citing Dellmuth v. Muth,* 491 U.S. 223, 225, 109 S.Ct. 2397, 105 L.Ed.2d 181 (1989)).

> It bears emphasis that the vast majority of parents whose children require the benefits and protections provided in the IDEA lack knowledge about the educational resources available to their child and the sophistication to mount an effective case against a district-proposed IEP.

Shaeffer, 126 S.Ct. at 540 (Ginsburg, J., dissenting)(citations and quotations omitted). That expert testimony is pivotal to the success of these cases was also clearly recognized in and part of the Second Circuit's rationale in its holding in the case on appeal: "Expert testimony is ... critical in IDEA cases, which are fact-intensive inquiries about the child's disability and the effectiveness of the measures that school boards have offered to secure a free appropriate public education." *Murphy v. Arlington Central School District Board of Education,* 402 F.3d 332, 338 (2d Cir. 2005).[13]

It is not enough, therefore, under due process requirements, to provide a gateway to relief, but then to lock out those who seek relief by tossing away the key to the gate – the key here being the availability to expert fees to the prevailing party. As Congress recognized, without expert assistance, parents of children with disabilities will not have the opportunity to be heard in a meaningful manner on the issue of obtaining meaningful access to a free appropriate public education. *Cf. Mathews v. Eldridge,* 424 U.S. 319, 552, 85 S.Ct. 893, 47 L.Ed.2d 18 (1976) (due process requires an opportunity to be heard at a meaningful

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[13] Many other courts have remarked the same, including: (*B.D. v. Buono,* 177 F.Supp.2d 201, 208 (S.D.N.Y. 2001); *Field v. Haddonfield Bd. Of Educ.,* 769 F.Supp. 1313, 1323 (D.N.J.1991).

time in a meaningful manner). Consequently, without the right to recoup expert fees, the gateway to relief will be locked to parents who cannot afford to obtain the essential expert assistance that they must have in order to meet their affirmative burden of proof.

3. The Petitioner's Competing Concern to Limit or Reduce Its Budget Does Not Outweigh the Requirement of Providing Equal Access to a Free Public Education to All Children

Both Petitioner and their supporting Amici argue in various ways that Congress has expressed concern with reducing litigation costs by including mediation as a means of resolving IDEA disputes and by authorizing the reduction in attorneys fees awards in certain circumstances, such as when parents unreasonably protract the resolution of the dispute. This observation, however, does not support their next contention that allowing expert fees will drive up the costs of litigation.

> "[Sc]hool districts not only will be required to pay for parents' experts (in cases where parents prevail), but also school districts will be increasingly forced to hire their own experts to refute the positions taken by the parents' experts in due process hearings..."

Brief of Amici Curiae National School Boards Association, *et al,* p.18. This contention constitutes a reversal of reality. Indeed, the likelihood that school districts will have to hire outside experts is small as school districts already have

access to their own special education teachers and experts, who largely work on staff, in paid positions. This underlines the very reason why expert fees must be allowed so that parents who disagree with school boards can successfully challenge their decisions. Congress provided parents with the procedural right to obtain their own experts *because* they understood that experts were "necessary for the preparation of the parent or guardian's case in the action or proceeding..." H.R. Conf. Rep. 99-687, at 5 (1986), *reprinted in* 1986 U.S.C.CA.N. 1807, 1808.

The fact that allowing expert fees will force school districts to bear those costs was well understood and weighed by Congress when it drafted the statute and when the conferees wrote their conference report. However, because the very purpose of providing equal access is thwarted by restricting due process procedures meant to guarantee such access, the school districts' interest in reducing costs does not outweigh the need of parents with children with disabilities to have that equal access. As the *Mills* court stated,

> The defendants are required by the Constitution of the United States, [the IDEA,] and their own regulations to provide a publicly-supported education for these "exceptional' children. Their failure to fulfill this clear duty... and their failure to afford them with due process hearing...cannot be excused by the claim that there are insufficient funds...
>
> Constitutional Rights must be afforded citizens despite the greater expense involved.... [and] ... [t]he inadequacies of the [School Board] ... certainly cannot be permitted to bear more heavily

> on the "exceptional" or handicapped child than on the normal child.

Mills, 348 F.Supp. at 876.

The Petitioner's and Amici's positions demonstrate the truth of the observation in *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 865 (6th Cir.2004): "Left to its own devices, a school system is likely to choose the educational option that will help it balance its budget, even if the end result of the system's indifference to a child's individual potential is a greater expense to society as a whole." [14] The Court should bear in mind, that the very reason parents need experts is to ensure that they have a full and fair hearing when they disagree with a school board's view of their child's educational needs. Indeed, it is only when the parent is the prevailing party, when the parents have been vindicated in their claim that the defendant has actually violated the IDEA, that they can receive an award of costs.

The Petitioner would like to turn the process on its head, and under the guise of "cooperation" achieve the goal of reducing its affirmative responsibility under the IDEA to provide a free appropriate public education by restricting, even negating, parents' ability to challenge the School

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[14] Indeed, as the Court noted in *Cedar Rapids Community School District v. Garret F.*, 526 U.S. 66, 77-78, 119 S.Ct. 992, 999, 143 L.Ed.2d 154 (1999), although "the potential financial burdens imposed on participating States may be relevant to arriving at a sensible construction of the IDEA...Congress intended to open the door of public education to all qualified children..." Thus the Court rejected the District's cost-based interpretation: "This case is about whether meaningful access to the public schools will be assured"...[and therefore] "[u]nder the statute, our precedent, and the purposes of the IDEA, the district must fund such "related services" in order to help guarantee that students like Garret are integrated into the public schools." *Id*, 526 U.S. at 79, 119 S.Ct. at 1000.

Board's decisions. "Unfortunately for the district, the "free" in FAPE means free to the student, not to the district." *Gagliardo v. Arlington Central School District,* ___ F.Supp.2d ___, 2006 WL 561233 (S.D.N.Y. March 3, 2006).

In sum, denying awards of expert fees conditions equal access to a public education to parents who can afford the cost of experts and creates an implied criterion of wealth. It will produce a serious chilling effect on those seeking merely to enforce the rights already given.[15] It alters the affirmative obligation of schools to comply with the IDEA by making parents bear the cost of seeking redress when the schools have actually already deprived the disabled child of his or her right to a free public education. It takes the "free" out of "free appropriate public education" and denies equal access on equal terms to *all* children with disabilities.

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[15] As the court in *Holbrook v. District of Columbia* stated in the context of attorneys fees awards,

> "[U]nreasonable penny-pinching scrutiny, such as Defendant has engaged in here produces serious chilling effects on the availability of competent, experienced attorneys to serve this clientele. This is extremely problematic for a number of reasons, not the least of which is that IDEA practice is highly specialized – an attorney who does IDEA work must understand the intricacies and the realities of the practice in order to obtain effective relief for his or her client in terms of an appropriate, individualized educational placement.

305 F.Supp.2d 41, 48 (D.D.C. 2004). The same is true with respect to expert fee awards.

B. Because the IDEA's Purpose is to Impose An Affirmative Equal Protection Obligation, The Court Should Not Limit Courts' Discretion to Award Costs

Petitioner and Amici seek to contract the IDEA's remedial scope and to undermine its remedial scope by restricting the meaning of the phrase "reasonable attorneys fees as part of the costs" to exclude the award of expert fees. They argue that Congress derives its authority for the IDEA from the Spending Clause and that therefore expert fees cannot be part of the attorneys' fees or costs. That would not be true even if IDEA were solely a Spending Clause statute. However, as demonstrated, the IDEA is a mixed statute. It derives its authority to impose an affirmative remedial constitutional obligation on the States from the Fourteenth Amendment and is clearly not a "simple funding statute." *Honig v. Doe,* 484 U.S. at 310. As the Court stated in *Doe*,

> Congress' earlier efforts to ensure that disabled students received adequate public education had failed in part because the measures it adopted were largely hortatory...In amending EHA to its present form, Congress rejected its earlier policy of merely establishing an unenforceable goal requiring all students to be in school.

484 U.S. at 311, n.1 (citing 121 Cong.Rec. 37417(1975) (remarks of Sen. Schweiker)). What Congress did do was to set up an affirmative substantive obligation on the states to ensure that "children with disabilities receive an education that is both appropriate and free" and to provide

funds to aid the States in fulfilling that duty. *See Rowley*, 458 U.S. at 208.

Indeed, Part B[16] funds may not be used for litigation expenses. The Code of Federal Regulations states that "in any action or proceeding brought under section 615 of the Act, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents of a child with a disability who is the prevailing party." 34 C.F.R. § 300.513 (a). Importantly, it goes on to provide that "funds under Part B of the Act may not be used to pay attorneys' fees or costs of a party related to an action or proceeding under section 615 of the Act and subpart E of this part." 34 C.F.R. § 300.513 (b)(1).[17]

To be clear then, the affirmative obligations Congress imposes on States derive from its authority under the Fourteenth Amendment equal protection clause. Because this is an equal protection statute, Congress has gone out of its way to provide significant and comprehensive due process protections to the parents of

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[16] Part B funds are those provided to the states for special education and related services.

[17] As explained in the Federal Register:

> ...The limited Federal resources under this Act should be used to provide special education and related services and not be used to promote litigation of disputes. Further, that paragraph has been modified to make it clear that the prohibition against using Part B funds for attorney's fees also applied to the related costs of a party in an action or proceedings, such as depositions, expert witnesses, settlement, and other related costs.

Reg. 64 Fed. Reg.R 12406-01, at 12515 (Mar. 12, 1999). Moreover, this same prohibitory language is found at 64 Fed.Reg. 53808, 53812 (Sept. 5, 2002) regarding the Early Intervention Program for Infants and Toddlers with Disabilities, Part C.

children with disabilities. It has, from its Spending Clause authority provided aid to States as a means of ensuring that its intent to ensure equal access to a free appropriate education for all.

The IDEA grants courts considerable discretion and equitable authority to make parents whole where school districts have violated the substantive and procedural requirements of the statute. *Florence County School District v. Carter,* 510 U.S. 7, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993); *Burlington,* 471 U.S. at 369. The Court in *Carter* noted

> There is no doubt that Congress has imposed a significant financial burden on States and school districts that participate in IDEA. Yet public educational authorities who want to avoid reimbursing parents for the private placement of a disabled child can do one of two things: give the child a free appropriate public education in a public setting, or place the child in an appropriate school in an appropriate private setting oaf the State's choice. This is IDEA's mandate, and school officials who conform to it need not worry about reimbursement claims.

510 U.S. at 15, 114 S.Ct. at 366. The same logic applies whether the cost the school district must bear to make parents whole and to ensure that the "free" in "free appropriate public education" is free is for reimbursing parents for private school tuition, or for the reimbursement of expert fees expended to ensure the parents have equal access to the procedural due process protections provided them in the statute.

If the Court restricts the application of section 1415(i)(3)(B) to exclude the award of expert fees, the result will be the same that the Court foresaw in *Carter* and *Burlington*. "It would be an empty victory," for parents who sought their due process rights under the statute and prevailed, "to have a court tell them several years later that they were right but that these expenditures could not in a proper case be reimbursed by the school officials...such a result would be contrary to IDEA's guarantee of a "free appropriate education." *Carter*, 510 U.S. at 12 (*quoting Burlington*, 471 U.S. at 370, 105 S.Ct. at 2003).

The Court would have to put on blinders in order to ignore Congress' clear statement of the true substance of the IDEA purpose. The Court should not place its imprimatur on a system that provides parents with procedural safeguards and then leaves them with an empty victory when they are forced to make use of those safeguards or that deprives parents altogether of the equal access to obtaining the proof which the court itself requires because the parents cannot bear the cost of obtaining that proof. The Court should uphold the remedial purpose of the IDEA, which was to provide equal access on equal terms to a free appropriate education for all children with disabilities by ensuring that the full due process safeguards intended by Congress are vouchsafed to those who are forced to fight a recalcitrant school district *and prevail*.

IV.
CONCLUSION

For all of the foregoing reasons, the Court should affirm the Second Circuit.

DATED: March 28, 2006

Respectfully submitted,

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ARLINGTON CENTRAL SCHOOL DISTRICT
BOARD OF EDUCATION,

Petitioner

v.

PEARL MURPHY AND THEODORE MURPHY

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF FOR THE NATIONAL DISABILITY RIGHTS NETWORK AND THE CENTER FOR LAW AND EDUCATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

This case is of particular interest to *amici*, who advocate on behalf of children with disabilities to ensure that they receive the free appropriate public education they are guaranteed under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*

Amicus National Disability Rights Network (NDRN), formerly the National Association of Protection and Advocacy Systems, is the membership association of protection and advocacy (P&A) agencies that are located in all 50 states, the District of Columbia, Puerto Rico, and the territories. P&As are authorized under various federal statutes to provide legal representation and related advocacy services on behalf of persons with all types of disabilities in a variety of settings. In fiscal year 2004, P&As served over 76,000 persons with disabilities through individual case representation and systemic advocacy.

The P&A system comprises the nation's largest provider of legally based advocacy services for persons with disabilities. P&A lawyers often represent or assist parents of children with disabilities in the impartial due process hearings authorized under the IDEA and know first-hand of the need for parents to retain experts if they are to have a chance of prevailing.

Amicus The Center for Law and Education (CLE) is a national advocacy organization that works with parents, advocates, and educators to improve the quality of education for all students, and in particular, students from

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[1] Letters from the parties consenting to the filing of *amicus* briefs have been filed with the Clerk of this Court pursuant to Supreme Court Rule 37.3(a). No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

low-income families and communities. Throughout its history, CLE has been a recognized leader in advancing the rights of students with disabilities – from federal policy through state and local implementation. As one of the few national organizations that is firmly rooted in both disability rights and school reform, CLE has focused increasingly on bringing the two together – in order to help ensure, for example, that specialized instruction and support services provided through individualized education programs, assessment practices, placement decisions, etc., are aimed at overcoming the barriers for students with disabilities to meeting high standards, rather than being vehicles for lower expectations.

CLE has participated in other important cases involving the recovery by prevailing parents of costs and fees under IDEA. In 1990, CLE represented members of the United States Senate and House of Representatives as *amicus* in *Moore v. District of Columbia*, 907 F.2d 165 (D.C. Cir. 1990), in which the U.S. Court of Appeals for the District of Columbia Circuit *en banc* recognized a cause of action under IDEA on behalf of prevailing parents to attorney's fees incurred in administrative due process hearings.

SUMMARY OF ARGUMENT

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, was enacted to guarantee children with disabilities the right to a "free appropriate public education." 20 U.S.C. § 1400(d)(1)(A). At issue in the instant dispute is whether parents of children with disabilities must effectively waive the right to a "free" public education when the school district refuses to provide an "appropriate" one, thereby forcing the parents to invoke their statutory right to an impartial due process

hearing to remedy the deficiency. Because effective parental participation as contemplated by IDEA should not come at a cost, Congress in IDEA's text and structure has authorized parents who prevail in vindicating their children's IDEA rights to be reimbursed for their costs of obtaining an expert to resist and remedy the school district's violation of the law.

A. IDEA accomplishes its substantive statutory mandate of providing to each child with a disability a free special education that offers educational benefit through extensive procedural protections, which ensure constant parental involvement. Although parents and school districts reach agreement in the overwhelming majority of IDEA cases through collaborative efforts, genuine disagreements as to what constitutes an "appropriate" public education do arise. Congress granted parents in such circumstances a statutory right to have these disputes resolved in a due process hearing before an impartial hearing officer. The ability of parents to retain experts is critical to these hearings fulfilling their assigned function of determining the appropriate education for the child, and reimbursement of prevailing parents for the costs of experts is necessary to enable parents to retain them.

Notwithstanding the parent-school district cooperative goals of IDEA, due process hearings are unquestionably adversarial. The school district and parents each have their own perspective as to what constitutes the appropriate education of the child. As this Court has recognized, when IDEA cases turn adversarial, the school district is armed with greater resources, more information, and employees that it can rely on to testify as experts. Yet the parents generally bear the burden of showing that the school district's proposal is inappropriate.

Empirical evidence and case law, as well as *amici*'s experiences working with thousands of parents of children with disabilities, demonstrate that the most important resource for parents in ensuring that their children receive a free appropriate public education is access to experts with whom parents can consult. Expert testimony and consultation are effectively required to sustain the parents' burden on many critical issues in due process hearings. Without the benefit of expert resources to present factual evidence and context and to assist the parents in challenging the school district's experts, parents of children with disabilities simply have little chance of prevailing in a due process hearing even if they are correct.

B. Congress has addressed this issue by authorizing parents of children with disabilities who prevail in a due process proceeding to recover the expert fees expended in securing a free appropriate public education for their children. *See* 20 U.S.C. § 1415(i)(3)(B). In enacting that provision in the Handicapped Children's Protection Act of 1986, Congress explicitly contemplated that IDEA's cost-shifting provision would award prevailing party parents costs incurred "by personnel, including attorneys and *consultants*, involved in the action or proceeding." Pub. L. No. 99-371 § 4(b)(3), 100 Stat. 796, 797-798 (emphasis supplied). Because of this congressional action, costs awarded under IDEA thus are not limited to those deemed permissible in *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83 (1991).

This result is further reinforced by IDEA's broad grant of remedial authority to district courts and the structure of the statute. IDEA guarantees a "free" education for children with disabilities, and expects parental involvement to ensure that this education is "appropriate."

Parents are afforded the right to participate at every stage of the IDEA process, and to be accompanied by their own expert at a due process hearing. This opportunity to participate would be meaningless, however, if the parents were required to pay thousands of dollars from their own pockets in order for their child to receive the "free" public education guaranteed by the statute. As this Court has recognized, IDEA's mandate of providing "free appropriate public education" would be eviscerated if parents were required to choose between a "free" education and an "appropriate" one. *Town of Burlington v. Department of Educ.*, 471 U.S. 359, 371 (1985).

C. Finally, there is no reason for this Court to depart from its well-established Spending Clause jurisprudence and construe IDEA narrowly. As this Court has held in the context of IDEA, all that the Spending Clause requires is that entities receiving federal funds have notice that conditions are attached to the acceptance of such funds. *See Irving Independent Sch. Dist. v. Tatro*, 468 U.S. 883, 890 n.6, 891 & n.8 (1984); *Smith v. Robinson*, 468 U.S. 992, 1002 n.6 (1984). IDEA has unquestionably satisfied that requirement, and this Court's decisions in *Town of Burlington* and *Florence County School District v. Carter*, 510 U.S. 7 (1993), confirm that a narrow construction of IDEA's remedies is unwarranted.

ARGUMENT

IDEA AUTHORIZES COURTS TO AWARD PARENTS OF CHILDREN WITH DISABILITIES EXPERT FEES AS PART OF COSTS WHEN THEY ARE PREVAILING PARTIES IN IDEA ADMINISTRATIVE OR JUDICIAL PROCEEDINGS

The core of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, is the

substantive requirement that every State that accepts federal IDEA funds must provide each child with a disability a free appropriate public education tailored to accommodate their disabilities and to achieve educational benefit. *See Board of Educ. v. Rowley*, 458 U.S. 176, 209 (1982). This substantive standard necessarily requires reliance on a wide range of experts to take into account the diverse array of disabilities and the almost unique circumstances of each child.[2]

If parents disagree with the school district; are able to afford to retain their own experts in order to contest what they perceive as the school district's proposal for an inadequate and inappropriate educational program; and prevail in convincing an impartial hearing officer (or court) that the school district's proposal does not comply with the requirements of the statute, the parents should be able to recover the reasonable costs expended on such experts from the school district.

A. Experts Are Critical To Parents' Ability To Ensure That Their Children Receive A Free Appropriate Public Education

Parents know their children in different and more profound ways than anybody else. Parents have had years living with, observing, understanding, and responding to their children. In view of this reality, Congress thus guaranteed parents of a child with a disability a formal role in the development of the child's individual education program. The efficacy of IDEA relies on parents to advocate on behalf of their children and to demand compliance with the law. *See Rowley*, 458 U.S. at 205-206;

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[2] Experts in due process hearings can include special education administrators, researchers, psychologists, doctors, nurses, audiologists or speech language pathologists, occupational or physical therapists, behavioral experts, and other specialists with particular knowledge of disabilities and educational practices.

National Council on Disabilities, *Back to School on Civil Rights – Advancing the Federal Commitment to Leave No Child Behind*, at 6-7, 50, 70 (2000).

If the parents and the school district cannot reach a consensus, Congress gave the parents a right to demand a due process hearing before an impartial hearing officer and, if still aggrieved, review by federal or state courts. *See* 20 U.S.C. § 1415. These due process safeguards are intended to give parents the "necessary tools to improve educational results for children with disabilities." *Id.* § 1400(d)(3). Congress also enacted provisions to deter and sanction frivolous claims and to encourage reasonable settlements. *See id.* §§ 1415(i)(3)(D) & (F), 1415(i)(3)(B)(i)(II) & (III).

These procedures are rarely invoked by parents. Rather, most disputes under IDEA are resolved through collaborations between parents and school officials. In any given year, the overwhelming majority of school districts (94%) do not hold any due process hearings.[3] Of the more than 6 million children with disabilities entitled to IDEA's protection, approximately 3000 due process hearings are held each year.[4] Parents prevail in approximately 43% of such hearings.[5] Less than 10% of

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[3] E. Schiller, K. Burnaska, G. Cohen, Z. Douglas, C. Joseph, P. Johnston, A. Parsad & C. Price, *Study of State and Local Implementation and Impact of the Individuals with Disabilities in Education Act: Final Report on Selected Findings* 45 (2003).

[4] In 2000, although there were 11,068 requests for hearings, only 3,020 hearings were actually held nationwide, a 15% decline over the previous five years. General Accounting Office, *Special Education: Numbers of Formal Disputes Are Generally Low and States Are Using Mediation and Other Strategies to Resolve Conflicts* (GAO-03-897), at 12-13 (2003).

[5] J. Chambers, J. Harr & A. Dhanani, Special Education Expenditure Project, *What Are We Spending on Procedural Safeguards*

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due process hearing results are appealed to court (by either parents or school districts) – about 300 cases annually.[6]

1. Due process hearings are structured to make it necessary for parents to retain their own experts

Due process hearings are, by design, adversarial. Hearings are to be conducted according to "appropriate, standard legal practice." 20 U.S.C. §1415(f)(3)(A)(iii); *see also Handicapped Children's Protection Act of 1985: Hearings on S. 415 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Resources*, 99th Cong. (1985) (Statement of Sen. Simon) ("[Due process] hearings – where witnesses are called and sometimes technical and medical evidence is offered – are quasi-judicial."). The object of these quasi-judicial due process procedures is to develop a complete and accurate factual record and to obtain a prompt decision by an impartial expert decisionmaker.

When a due process hearing is held at the request of the parent, the parent will (absent state law to the contrary) normally bear the burden of proof of showing that the school district's proposal does not comply with IDEA. *See Schaffer v. Weast*, 126 S. Ct. 528, 536 (2005). Parents have the right (indeed, the obligation if they wish to meet their burden of proof) to present evidence and to examine and cross-examine witnesses. 20 U.S.C.

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in Special Education, 1999-2000?, at 20 (May 2003); General Accounting Office, *Special Education: The Attorney Fees Provision of Public Law 99-372* (HRD-90-22BR), at 3 (1989).

[6] Only 301 court cases under IDEA were filed nationwide in the 1998-99 school year, while 3,315 and 3,126 due process hearings were held in 1998 and 1999, respectively. Chambers, Harr & Dhanani, *supra*, at 7-8.

§ 1415(h). Parents are afforded a right to be represented by counsel, if they can locate and afford one. *Id.* § 1415(h)(1).[7] Additionally, parents have a right "to be accompanied and advised * * * by individuals with special knowledge or training with respect to the problems of children with disabilities." *Ibid.*

The law requires an impartial hearing examiner with appropriate qualifications and expertise in the law. 20 U.S.C. § 1415(f)(3)(A)(ii)-(iv). Hearing officers may be expert in administrative law and educational law, but are not required to possess expertise in the unique disability issues involved in any particular case. *Ibid.*; G. Schultz & J. McKinney, *Special Education Due Process: Hearing Officer Background and Case Variable Effects on Decisions Outcomes*, 2000 B.Y.U. Ed. & L. J. 17, 21-22 (2000) (most hearing officers have no background on disability issues).

2. Experience shows that experts are critical to parents' chances of demonstrating in a due process hearing that the school district erred

IDEA's extensive procedural protections for parents to ensure their involvement in the development of an individualized education program (IEP) are driven by the proposition that these processes will provide a crucible

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[7] Even with the addition of a statutory provision in 1986 permitting a court to award attorney's fees to a prevailing parents, parents still are disproportionately unrepresented in due process proceedings compared to school districts. For example, in New York parents are represented by lawyers in 31% of proceedings while school districts are so represented in 100% of proceedings; in Illinois, parents have lawyers in 35% of proceedings and school districts have lawyers in 91% of proceedings. 150 Cong. Rec. S5351 (daily ed. May 12, 2004) (Statement of Sen. Kennedy).

from which a child's appropriate education will emerge. Yet parents' assertion of their child's procedural rights is not sufficient to assure an appropriate education. The consensus of the empirical studies and the case law, which *amici* can confirm based on their own experience working with thousands of parents, is that those procedural protections are virtually meaningless if parents do not introduce expert evidence or do not have experts assisting them in presenting their case.

When the question at issue in a hearing is the "appropriate" education for a particular child, the burden on parents includes presenting knowledge about the child's disability;[8] the child's present level of achievement, including his abilities and assessments, evaluations, and function in school settings;[9] the child's specific educational needs (*e.g.*, placement and services);[10] and the capacity of the proposed educational program to address the child's disability, enable the child to achieve the proposed educational goals, and provide educational benefit.[11] In this type of inquiry, parents who do not have access to experts cannot effectively present facts in support of their

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[8] *Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194 (3d Cir. 2004) (expert testimony as to needs of emotionally disturbed child and appropriate placement).

[9] *Nein v. Greater Clark County Sch. Corp.*, 95 F. Supp. 2d 961 (S.D. Ind. 2000) (parent's expert testified as to student's progress and requisite expertise for teachers of dyslexic students).

[10] *Evans v. Board of Educ.*, 930 F. Supp. 83 (S.D.N.Y. 1996) (parent's experts on dyslexia presented uncontroverted evidence that recommended method of instruction was necessary, not merely optional).

[11] *Board of Educ. v. Michael M.*, 95 F. Supp. 2d 600, 610 (S.D. W. Va. 2000) (experts needed on issue of reasonable goals).

position, thus defeating the very purpose of the hearing. Such parents are, indeed, left "without an expert with the firepower to match the opposition," *Schaffer*, 126 S. Ct. at 536, and have little hope of carrying the burden required to prevail, no matter how meritorious their position.[12] The need for experts was heightened by a 2004 amendment to IDEA, which imposed a new requirement that special education must be "based on peer-reviewed research to the extent practicable." 20 U.S.C. § 1414(d)(1)(A)(i)(IV). Under this criterion, parents also must present evidence regarding the educational options available that are appropriate for that child, the research regarding the generally acceptable methodologies being used to educate similar students, and whether the proposed program is generally accepted by the educational community or recognized by educational experts as reasonable.[13]

By contrast, a parent's special knowledge about his or her child is rarely credited in such proceedings, no matter how relevant. Parents may have well-informed knowledge and beliefs as to their child's needs, not to mention a

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[12] *In the Matter of Student v. Poudre Sch. Dist. R-1*, Due Process Hearing L2003:120 (Colo. Feb. 11, 2004), http://www.cde.state.co.us/spedlaw/download/DP2003-120.pdf (when a parent "produced no testimony other than her own" regarding child's emotional distress due to placement, and need for classroom aide the parent "did not sustain a defense to the onslaught of educational and psychological experts from the district").

[13] *Michael M*, 95 F. Supp. at 610 (experts should opine whether methodology is recognized by educational experts and generally accepted in the educational community for similar children); *S.H. v. State-Operated Sch. Dist.*, 336 F.3d 260, 267 (3d Cir. 2003) ("In this particular matter [appropriate placement], the credibility and persuasiveness of the testimony is of paramount concern" and parent's expert was persuasive because she was "impeccably credentialed" in deaf education – "no one connected with the hearing knew more about deaf education than she").

wealth of personal experience with their own child, but parental testimony is all too often discredited as merely "anecdotal" or not objective evidence.[14] Hearing officers and courts may comment on the knowledge of parents about their children, but they do not treat them as qualified experts, even when their knowledge of their child's disability plainly exceeds that of the school personnel. Indeed, in many cases, parents' testimony is not even treated as evidence.[15]

A study of due process hearing outcomes found that the single best predictor of whether a parent will prevail in a due process hearing is the number of witnesses the parents call. *See* P. Kuriloff, *Is Justice Served by Due Process?: Affecting the Outcome of Special Education Hearings in Pennsylvania*, 48 Law & Contemp. Probs. 89, 100-101, 109 (Winter 1985 No. 1). Such parents "won more often" because they could use their witnesses to "present[] their cases more effectively, and cross-examine[] the school's witnesses more thoroughly." P. Kuriloff & S. Goldberg, *Is Mediation a Fair Way to Resolve Special*

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[14] *See, e.g., Parents of [Redacted] v. Montgomery County Pub. Sch.*, OAH No. MSDE-MONT-OT-04-50271 at 25-26, (Md. OAH Dec. 21, 2004), http://www.msde.md.gov/NR/rdonlyres/AE1F478C-AB7F-407F-85C8-CEC950B8C836/4993/04HMONT50271.pdf (granting school district's motion to dismiss before putting on school evidence: "Parents' evidence of the Child's development and progress * * * during that period was primarily anecdotal and was supplied largely by the mother. * * * There was evidence * * * that she has some background as an educator, although she was not qualified as an expert in special education or other fields germane to the Child's learning disabilities.").

[15] *See, e.g., Poudre, supra* (parent testimony as to emotional response of child to placement discredited because it "lacks the support of an expert"); *[Redacted] v. Baltimore City Pub. Sch.*, OAH NO: MSDE-CITY-OT-200200192 (June 26, 2002), http://www.msde.md.us/SpecialEducation/hearing_decisions2002/02-H-CITY-192.pdf (testimony of guardian and student characterized as "not factual evidence;" school district granted summary judgment without presenting evidence).

Education Disputes? First Empirical Findings, 2 Harv. Negotiation L. Rev. 35, 40 (Spring, 1997). Indeed, the number of witnesses called by the parents correlated with successful outcomes even more than whether the parents were represented by counsel. *See* Kuriloff, *supra*, at 100.

Normally, however, school districts can, and do, "call on many more experts in developing their arguments than can the average parent." Kuriloff & Goldberg, *supra*, at 62. Twice as many witnesses in due process hearings testify for the school district, on average 4.5 witnesses for the school, and only 2 for the child.[16] Furthermore, in one study, the parents' witnesses typically consist of the child's mother and one other witness.[17] The cause for this disparity is due to the fact that school districts largely employ the experts throughout the special education procedural process. "School districts have a 'natural advantage' in information and expertise * * *." *Schaffer*, 126 S. Ct. at 536; *Oberti v. Board of Educ.*, 995 F.2d 1204, 1219 (3d Cir. 1993). School experts are already on staff – teachers, psychologist, the special education director, speech language pathologists, physical therapists, etc. – and available to testify at the due process hearings. In most cases, virtually all school system witnesses are treated as experts by hearing officers.[18]

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[16] Cherie N. Simpson, *Parent Perceptions of the Special Education Due Process Hearings in Michigan*, 1980-1981, pp. 127-130, 212 (1984) (Ph.D. dissertation, Michigan State University) (on file with Michigan State University Microfilms).

[17] *Ibid.*

[18] *Michael M.*, 95 F. Supp. 2d, at 611 (S.D. W. Va. 2000) (classroom teachers described as experts); *Clay T. v. Walton County Sch. Dist.*, 952 F. Supp. 817, 823 (M.D. Ga. 1997) (same); *Poudre, supra*, at 16 (teachers are educational experts).

Reflecting this reality, courts have consistently acknowledged that expert testimony is necessary in order for a parent to have a chance of showing that the school district is not complying with the law. Thus, the Fourth Circuit held in the *Schaffer* case, that "parents will have to offer expert testimony" in order to "mount a serious, substantive challenge to an IEP." *Schaffer v. Weast*, 377 F.3d 449, 456 (4th Cir. 2004); *see also Oberti*, 995 F.2d at 1216 (3d Cir. 1993) ("The court will have to rely heavily * * * on the testimony of educational experts."); *Pazik v. Gateway Reg'l Sch. Dist.*, 130 F. Supp 2d 217, 22 (D. Mass. 2001) ("[E]xpert testimony is often critical to a case.").

An illustrative case involved 9-year old Rachel Holland, who was classified as moderately retarded.[19] The school proposed that she spend most of her day in a segregated special education classroom. Her parents requested a full-time placement in a regular classroom, based on success she had shown over several years in a private school classroom while the due process case was pending. In weighing the testimony of the expert witnesses for both sides, the court found the parents' witnesses to be more credible because they had more background in evaluating similar children in regular classrooms, and they had a greater opportunity to observe Rachel in a normal academic setting. The court concluded that Rachel would experience significant academic and nonacademic benefits from the mainstream placement. The hearing officer, federal district judge, and federal circuit court all ruled for the parents over the course of the five-year legal ordeal. Without expert assistance, the parents undoubtedly would not have been able to obtain

[19] *Sacramento City Unified Sch. Dist. v. Holland*, 786 F. Supp. 874 (E.D. Cal. 1992), *aff'd*, 14 F.3d 1398 (9th Cir.), *cert. denied*, 512 U.S. 1207 (1994).

what all the impartial decisionmakers agreed was the appropriate placement for their child.

B. IDEA's Structure And Text Convey Broad Authority To District Courts To Provide Any Appropriate Relief To A Prevailing Party, Including Awarding Parents The Costs Of Obtaining An Expert

The empirical evidence and case law demonstrate a clear need by parents to retain their own experts. But the structure and purpose of IDEA evince as well a clear mandate on the part of Congress to permit district courts to award litigation expenses, including expert and consultant fees, to prevailing party parents. 20 U.S.C. § 1415(i)(3)(B). IDEA thus ensures that a lack of parental resources will not prevent the vigorous enforcement of the law against an errant school district.

1. *Casey* does not control the proper interpretation of the term "costs" in IDEA

Absent congressional action, the range of costs ordinarily recoverable to a party prevailing in federal court are limited to those enumerated at 28 U.S.C. §§ 1920 and 1821(b). *See West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 86 (1991); *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 439 (1987). But this Court has also recognized that the use of the term "costs" is not inflexible across all public laws, and that Congress can authorize, and in fact has on numerous occasions, the award of expert fees to the prevailing party in a federal action. *See Casey*, 499 U.S. at 89. The language allowing for the recovery of such fees can take a variety of forms, so

that there are no "magic words" that Congress must universally employ. *See id.* at 88-92 (noting that expert fees can be authorized by provisions that define, provide context, or separately authorize the expert fees).

As respondents demonstrate more fully, both the text and structure of IDEA reflect Congress's intent that the specific litigation expenses that can be recovered by prevailing party parents include expert fees. Congress enacted the Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796 (1986), which initially added what is now Section 1415(i)(3)(B) to IDEA, in response to this Court's decision in *Smith v. Robinson*, 468 U.S. 992 (1984), which held that prevailing party parents could not recover attorney's fees in special education cases.

In so doing, Congress was cognizant of the financial responsibilities IDEA already imposed upon state and local governments. Accordingly, in expanding the remedies available to prevailing parents by authorizing awards of costs incurred during the due process and judicial proceedings, Congress mandated in Section 4 of the Handicapped Children Protection Act that the then-General Accounting Office (GAO) study the "impact" of Section 1415(i)(3)(B) over a three-and-a-half-year period following the Act's effective date. Pub. L. No. 99-372 § 4, 100 Stat. at 797. In this report, the GAO was required to examine "the specific amount of attorney's fees, costs, *and expenses* awarded to the prevailing party" under Section 1415(i)(3)(B) and "the number of hours spent by personnel, including attorneys *and consultants*, involved in the action or proceeding" where such fees were awarded. *Id.* § 4(b)(3) (emphases supplied). This statutory language demonstrates that, in enacting Section 1415(i)(3)(B), Congress understood that expert (*i.e.*, consultant) fees would be paid by school districts to prevailing party parents and thus required

examination. Had Congress intended to award to prevailing party parents *only* attorney's fees and those costs set forth in 28 U.S.C. §§ 1920 and 1821(b), there simply would have been no need for Congress to order, by statute, the GAO to study "expenses" and "the number of hours spent by * * * consultants" in cases where such costs were awarded to parents under Section 1415(i)(3)(B) *in addition* to "attorney's fees [and] costs." Pub. L. No. 99-372, § 4(b)(3), 100 Stat. at 797-798.

In arguing for a more narrow interpretation of IDEA, petitioner and its *amici* would have the Court disregard that language of Section 4 of the Handicapped Children's Protection Act and, in turn, the very canon of statutory construction that caused the Court to reach the result it did in *Casey*: that no term in a statute can be found to "add nothing." 499 U.S. at 91. Accordingly, the narrow construction of recoverable "costs" set forth in *Casey* and *Crawford* plainly cannot apply to IDEA.[20]

2. Excluding expert fees from the term "costs" in IDEA would be contrary to IDEA's structure and purpose

Moreover, Section 1415(i)(3)(B) "must be read in context" of the rest of the Act. *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) ("[W]e follow 'the cardinal rule that statutory language must be read in context [since] a phrase gathers

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[20] In any event, to the extent the statutory language is only ambiguous rather than dispositive for respondents (which, at minimum, it must be if the language in Section 4 of the Handicapped Children's Protection Act is to have any meaning), this Court should look to the legislative history of the Act to discern congressional intent. As respondents demonstrate, this legislative history unquestionably confirms the common-sense understanding – that Congress intended expert fees to be recoverable as a part of costs. Indeed, this Court acknowledged in *Casey* that Congress intended an expansive reading of "costs" to apply to IDEA actions. *See* 499 U.S. at 91 n.5.

meaning from the words around it.'") (quoting *General Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 596 (2004)). Any interpretation of Section 1415(i)(3)(B) as not including an award of expert fees would create significant inconsistencies within IDEA's structure and purpose.

Unlike the provision in *Casey*, Section 1415(i)(3)(B) is not a stand-alone fee-shifting provision addressing a number of different statutes. Thus, it must be construed in accordance with IDEA's overall mission of ensuring a "free appropriate public education" to children with disabilities. 20 U.S.C. § 1400(d)(1)(A). Indeed, IDEA and its predecessor statute (the Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (1975)) were enacted to remedy a specific public problem – that "the educational needs of millions of children with disabilities were not being fully met" in public schools, either because they were "[being] excluded entirely from the public school system" or "not receiv[ing] appropriate educational services." 20 U.S.C. § 1400(c)(2)(A), (B), (C).

IDEA was enacted to provide these children with a remedy from their previous exclusion and mistreatment. The statute defines the "special education" the school district is required to provide as a "specially designed instruction, at *no cost* to parents, to meet the unique needs of a child with a disability." 20 U.S.C. § 1401(29) (emphasis supplied). To ensure that an education is appropriate for that child's unique needs, parents are expected to participate at every stage of the procedures required to design the child's special education. *See Town of Burlington v. Department of Educ.*, 471 U.S. 359, 368-369 (1985). IDEA thus expands "the role * * * of parents and ensur[es] that families of such children have meaningful opportunities to *participate* in the education of their children at school." 20 U.S.C. § 1400(c)(5)(B)

(emphasis supplied). This opportunity to participate would be meaningless, however, if the parents were required to pay thousands of dollars from their own pockets in order for their child to receive the "free" public education guaranteed by the statute.

This is a cost parents of children with disabilities are least able to bear, yet unable to forego. Parents of children with disabilities are often the least equipped to address independently the needs of their children. These parents are 50 percent more likely to have only a high school education or less when compared to the parents of students in the general population, and their college graduation rate is two-thirds that of other parents. *See* M. Wagner *et al.*, *Special Education Elementary Longitudinal Study (SEELS): The Children We Serve: The Demographic Characteristics of Elementary and Middle School Students with Disabilities and Their Households* 23-24 (2002).

Parents of children with disabilities also come from economic circumstances which would likely limit their ability to pay for experts in the absence of the opportunity of recovering costs if they are successful. Almost one quarter of children with disabilities are living in poverty, compared with 16 percent in the general population. *See* Wagner, *supra*, at 28. And parents of children with disabilities are a staggering 67 percent more likely to be unemployed. *See* M. Wagner *et al.*, *The Individual and Household Characteristics of Youth With Disabilities: A Report from the National Longitudinal Transition Study-2 (NLTS-2)* at 3-4 (2003). Overall, 65 percent of children with disabilities live in households with incomes less than $50,000, compared to only 45 percent of nondisabled children. *Id.* at 3-5. It is simply unrealistic to expect that these parents could afford the "appropriate" education for their children with disabilities on their own.

Parents with adequate financial resources may be able to hire the necessary experts to help develop and, if necessary, to present their factual case in a due process or judicial proceeding. But if families do not have the resources to retain such experts, a school district could, in light of the burden of proof, rest its case without presenting any evidence or witnesses in support of the IEP, and prevail. To deny such families effective access to expert witnesses diminishes the rights of those children, rather than protecting them.

> The need for expert advocacy to protect the rights of the child is undeniable and undisputed. The fundamental purposes of the IDEA are attainable only when disabled children can rely on the support of expert witness testimony in due process proceedings. * * * The IDEA does not limit its benefits to only those who can afford to recoup them. Quite the contrary, the IDEA seeks to ensure that all disabled children, whether rich or poor, receive a free appropriate public education designed to meet their unique needs.

Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1039 (8th Cir. 2003) (Pratt, J., dissenting).

3. IDEA's other remedial provisions, including Congress's mandate that courts "grant such relief as the court determines is appropriate," confirm the authorization to award expert fees

Parents ultimately can enforce their entitlement to a free appropriate public education in a civil action, and, along with costs that can be awarded pursuant to Section 1415(i)(3)(B), a court of competent jurisdiction also "shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(2)(C)(iii). When construing IDEA, this

Court consistently has interpreted the broad remedial language of the statute in favor of parents whose children wrongfully have been denied a free appropriate public education. Courts must ensure that the education is *both* "free" *and* "appropriate." "The Act was intended to give handicapped children both an appropriate education and a free one; it should not be interpreted to defeat one or the other of those objectives." *School Comm. of the Town of Burlington v. Department of Educ. of Mass.*, 471 U.S. 359, 371 (1985).

IDEA's purpose would be defeated if prevailing party parents could not recover the cost of expert fees expended for due process and judicial hearings. IDEA's objective that parents of children with disabilities participate in designing their child's *free* appropriate public education, and seek redress if the school district will not provide it, would be significantly impaired if they were required *to pay* when the school district failed to meet its obligation.

This Court has rejected interpreting IDEA's remedial provisions in a manner that "would defeat this statutory purpose." *Florence County Sch. Dist. v. Carter*, 510 U.S. 7, 14 (1993). In *Town of Burlington*, this Court took note of the fact that the administrative and judicial process regarding the placement of a child can take years, during which time, under the school district's view, parents were faced with the Hobson choice of leaving their child in a school district's proposed placement "to the detriment of their child if it turns out to be inappropriate or pay for what they consider to be the appropriate placement." 471 U.S. at 370. The Court concluded that "[i]f that were the case, the child's right to a *free* appropriate public education, the parents' right to participate fully in developing a proper IEP, and all of the procedural safeguards would be less than complete." *Ibid.* Thus, Congress "undoubtedly" could not have intended that

result. *Ibid.* The "appropriate" relief under Section 1415(i)(2)(B) must include "retroactive reimbursement to parents" whose children were *in*appropriately placed. *Ibid.*

Likewise, in *Carter*, parents of a child with a disability challenged a school district's IEP and placed their child in a private school. The school district's IEP ultimately proved inappropriate under IDEA, but the school district still refused to reimburse the parents on the grounds that the private school did not meet some of IDEA's technical requirements, such as employing only certified teachers, even though the private school unquestionably "provided an education otherwise proper under IDEA." *Carter*, 510 U.S. at 12-13. The Court rejected the school district's argument because those technical requirements "do not make sense in the context of a parental placement." *Id.* at 13. The Court held: "IDEA was intended to ensure that children with disabilities receive an education that is both appropriate and free. To read the provisions of [IDEA] to bar reimbursement in the circumstances of this case would defeat this statutory purpose." *Id.* at 13-14 (internal citation omitted).

Respondents here ask for no more or no less of this Court. An interpretation of IDEA which required parents to bear these costs in helping (or, as is sometimes the case, in compelling) the school district craft an *appropriate* education for their children would defeat the mandate that such an education be *free* as well. *See id.* at 14; *Town of Burlington*, 471 U.S. at 371. IDEA, when viewed as a whole, must be interpreted to permit prevailing party parents, who were wronged by the inappropriate placement of their children, to recover fees that were expended in securing the appropriate education IDEA guarantees. *See Hibbs*, 542 U.S. at 101.

4. The "independent educational evaluation of the child" authorized by IDEA does not obviate the need for parents to obtain reimbursement for expert fees

Petitioner suggests that prevailing parents do not need reimbursement for their own experts because IDEA effectively provides a free one to the parents in the form of an "independent educational evaluation." *See* Pet. Br. 6, 31-32. This argument rests upon a flawed understanding of the independent educational evaluation, which as a practical matter is extremely difficult for parents to obtain, and this Court's dictum in *Schaffer*. The so-called "right" to an independent educational evaluation is, at best, extremely limited, and was not intended to meet parents' needs for expert assistance in a due process hearing.

a. Section 1415 of IDEA grants parents of children with disabilities the "opportunity * * * to obtain an independent educational evaluation." 20 U.S.C. § 1415(b)(1). The term "educational evaluation" is a term of limitation under IDEA. The scope of an evaluation under IDEA generally is limited to gathering information and testing data regarding whether a child is or continues to be disabled and their educational needs. 34 C.F.R. § 300.532. An evaluation may not determine matters such as eligibility, educational goals, placement or services, since those decisions are the province of an eligibility committee or the IEP team. *See id.* §§ 300.343-344, 300.533-534. For the same reason, an educational evaluation does not review the school district's proposed IEP, placement, or services, since those matters are to be determined by others after the evaluation. Most courts have also limited parents to a *single* evaluation, regardless of the nature of the dispute between the parents and the school district.

See Warren G. v. Cumberland County Sch. Dist., 190 F.3d 80, 87 n.4 (3d Cir. 1999); *Hudson v. Wilson*, 828 F.2d 1059, 1065-1066 (4th Cir. 1987).[21]

b. The Department of Education's implementing regulations place further limits on the independent educational evaluation. The regulations provide that such an evaluation shall be "at public expense" only "if the parent disagrees with an evaluation obtained by [the school]." 34 C.F.R. § 300.502(b)(1). If parents agree with the evaluation, but disagree with the subsequent proposed IEP or the proposed placement or services, they may not obtain an independent educational evaluation at public expense.

Furthermore, a school district need not reimburse parents for an independent educational evaluation if the earlier evaluation conducted by the district was "appropriate." 34 C.F.R. § 300.502(b)(2)(i). Many courts have placed the burden on the parents to show at a due process hearing that the school district's evaluation is inappropriate. *See Ford v. Long Beach Unified Sch. Dist.*, 291 F.3d 1086, 1089-1090 (9th Cir. 2002); *Holmes v. Mill Creek Twp. Sch. Dist.*, 205 F.3d 583, 590-592 (3d Cir. 2000); *John M. v. Board of Educ.*, 2002 U.S. Dist. LEXIS 10931, at *29-31 (N.D. Ill. 2002); *Judith S. v. Board of Educ.*, 1998 U.S. Dist. LEXIS 11072, at *17 (N.D. Ill. July 14, 1998); *Maine Sch. Admin. Dist. #17*, 39 IDELR 281 (Me. Aug. 15, 2003).[22] Of course, without paying for a

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[21] One court has held that parents are entitled to obtain only one evaluation for each evaluation conducted by the public agency. *See Board of Educ. of Murphysboro v. Illinois State Bd. of Educ.*, 41 F.3d 1162, 1169 (7th Cir. 1994).

[22] At least one court has suggested that the parents must "identify particular omissions in the school district's case study evaluation and then show how these omissions prevented the district from developing an adequate program of specialized instruction" for the child in order to obtain reimbursement. *Judith S.*, 1998 U.S. Dist. LEXIS 11072, at *17.

(Continued on following page)

private evaluation and an expert of their own, parents are unlikely to be able to meet this burden.

Courts have also denied reimbursement if the location of the evaluation and the qualifications of the examiner do not meet the criteria set by the public agency for their own evaluations.[23]

c. Neither the statute nor the regulations require that the evaluator consult with the parents, or provide the results directly to the parents. To the contrary, a common practice is for the expert used in an independent educational evaluation to provide the results of his evaluation first to the school district, even without the parents' consent, *see* Letter to Katzerman, 28 IDELR 310 (OSEP Sept. 9, 1997), which in turn provides the evaluation to the parents.

Some hearing officers have held parents to an even tougher standard, denying reimbursement for an evaluation when the school district's evaluation has met certain procedural requirements (use of unbiased test by trained examiner under proper test procedures), regardless of whether the result is "correct." *See* S. Etscheidt, *Ascertaining the Adequacy, Scope, and Utility of District Evaluations*, 69 Exceptional Children 227, 240 (2003).

[23] *See Johnson v. Metro Davidson County Sch. Sys.*, 108 F. Supp. 2d 906, 920 (M.D. Tenn. 2000); *Judith S.*, 1998 U.S. Dist. LEXIS, at *17-18; *Das v. McHenry Sch. Dist. #15*, 1994 U.S. Dist. LEXIS 315, at *10-11 (N.D. Ill. Jan. 13, 1994). The Department of Education's Office of Special Education Programs has interpreted IDEA to allow a public agency to require parents seeking an independent educational evaluation to use evaluators on an agency-provided list unless the parents can show that an alternative evaluator meets agency criteria or can "demonstrate that unique circumstances justify the selection of an evaluator that does not meet agency criteria." Letter to Parker, 41 IDELR 155 (OSEP February 20, 2004); *see also* Letter to Young, 39 IDELR 98 (OSEP March 20, 2003); 64 Fed. Reg. 12,406, 12,607 (1999) (to be codified at 34 C.F.R. 300.502) ("Since public agencies must provide parents with information about where IEEs may be obtained, provided the options are consistent with §§ 300.530-536, public agencies have some discretion in the cost if it is at public expense.").

d. Petitioner reads *Schaffer* as prescribing a broader role for an independent educational evaluation. But it ignores that in *Schaffer*, the issue before this Court was whether the parents or the school district had the burden of proof in a due process hearing challenging an IEP. The Court noted that the parents' "most plausible argument" was that, because the school district possessed *all* the information, the school district, rather than the parents, should be required to affirmatively prove its case. 126 S. Ct. at 536. The Court rejected this argument because Congress has required school districts "to share information with" parents. *Ibid.* The independent educational evaluation thus was understood as one mechanism that provided parents with sufficient information so as to not alter the ordinary default rule regarding the burden of proof.

But, as discussed above, the independent educational evaluation does not provide parents an expert opinion in a due process proceeding. Instead, it merely guarantees an "independent" evaluation prior to the IEP. If parents wish to use an expert for anything beyond the initial evaluation, they must pay for it out of pocket without reimbursement. The independent educational evaluation provision has not been interpreted to require school districts to reimburse experts that provide services to parents such as consultation on goals, placement, or services; assistance with preparation for a due process proceeding; or testimony.

Thus, an independent educational evaluation does not, and cannot, come close to leveling the playing field. Indeed, as the empirical evidence demonstrates, that occurs only through the use of experts who are authorized by the statute to accompany and advise parents in due process hearings. 20 U.S.C. § 1415(h)(1).

C. Petitioner's Limiting Construction Of The Statute Based On The Spending Clause Is Unwarranted

In support of its miserly reading of IDEA, petitioner attempts to find (Pet. Br. 13-14, 19-20) in this Court's precedents a general principle that statutes enacted pursuant to Congress's power under the Spending Clause, U.S. Const., Art. I, § 8, Cl. 1, should be read narrowly, citing primarily *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), and the dissenting opinion in *Cedar Rapids Community School District v. Garrett F.*, 526 U.S. 66 (1999). That proposition finds no support in this Court's cases in general, and particularly not when addressing a federal court's authority to provide remedies for proven violations.

There is no sound basis for subjecting Spending Clause legislation to different interpretive rules than legislation enacted under other sources of congressional power. It is commonplace for a federal law not to govern the conduct of a party unless and until that party voluntarily undertakes the particular activity that is subject to the law, whether that be choosing to run a business large enough to be subject to the Fair Labor Standards Act, Title VII, etc.; choosing to discharge pollution into waters protected by the Clean Water Act; or choosing to market driver's license information subject to the Driver's Privacy Protection Act of 1994; or, as in this case, accepting federal funds under a federal program.[24]

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[24] Moreover, IDEA is not just Spending Clause legislation. As this Court explained, IDEA was "set up by Congress to aid the States in complying with their *constitutional obligations* to provide public education for handicapped children." *Smith*, 468 U.S. at 1009 (emphasis supplied). The United States has consistently urged that "IDEA was enacted not only pursuant to Congress's authority under the Spending Clause, but also pursuant to Section 5 of the Fourteenth Amendment."

(Continued on following page)

All *Pennhurst* requires is that entities that receive federal funds have notice that Congress or a federal agency has attached conditions to the acceptance of the funds. The Court held that that requirement was not met in *Pennhurst* because the relevant statutory language was merely "precatory." 451 U.S. at 18. It is undisputed that IDEA meets that requirement because the statute is clear that recipients of federal IDEA funds will be obliged to undertake significant obligations. *See Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 890 n.6, 891 & n.8 (1984); *Smith*, 468 U.S. at 1002 n.6.

Once that requirement of notice has been satisfied, the exact scope of the statute's obligations presents a straightforward matter of statutory interpretation, relying on all the normal tools of construction including text, structure, and legislative history. *See Honig v. Doe*, 484 U.S. 305, 324-325 & n.8 (1988); *Tatro*, 468 U.S. at 891-893; *see also Jackson v. Birmingham Bd. of Educ.*, 125 S. Ct. 1497, 1509-1510 (2005); *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 642-643, 650 (1999); *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 286 n.15 (1987); *Bennett v. Kentucky Dep't of Educ.*, 470 U.S. 656, 665-666 (1985).

Nor do this Court's decisions establish a requirement that recipients of federal funds be given unambiguous notice in the statute as to remedies available for

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Brief for United States as *Amicus Curiae* at 15, *Cedar Rapids Cmty Sch. Dist. v. Garret F.*, No. 96-1793 (S. Ct. Aug. 1998); *see also* Brief for the United States as Intervenor at 21 n.10, *M.A. v. New Jersey Dep't of Educ.*, No. 02-1799 (3d Cir. July 3, 2002) (IDEA "can be sustained as a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment"). Like the statute at issue in *Rumsfeld v. Forum for Academic and Institutional Rights Inc.*, 126 S. Ct. 1297 (2006), IDEA uses the Spending Clause to encourage school districts to do that which Congress could compel them to do pursuant to its authority under Section 5 of the Fourteenth Amendment.

noncompliance. To the contrary, this Court rejected that argument more than twenty years ago, holding that once Congress makes clear its intention to impose conditions on the receipt of federal funds, Congress need not go further and warn in advance of "the remedies available against a noncomplying State." *Bell v. New Jersey*, 461 U.S. 773, 790 n.17 (1983).[25] This holding is consistent with the approach adopted by this Court in both *Carter* and *Town of Burlington*, in which IDEA's remedial provision was read to provide district courts broad authority to provide any appropriate relief that furthers the purposes of the statute.

Certainly these holdings apply with greater force to the question of what constitutes "costs" under IDEA. As this Court has explained, awarding costs incurred during litigation to a prevailing party is unlikely to impose any

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[25] Indeed, such a requirement could not be reconciled with the very nature of an implied right of action, which by definition is not made express in the text of a statute. Yet the Court has long accepted that a private right of action may be implied against a public recipient of federal funds. *See, e.g., Jackson*, 125 S. Ct. at 1504; *Franklin v. Gwinett County Pub. Schs.*, 503 U.S. 60, 65-66 (1992); *Cannon v. University of Chicago*, 441 U.S. 677, 704-706 (1979); *cf. Board of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226 (1990) (adjudicating claim under Equal Access Act, which imposes obligations on school districts that receive federal funds, that has no express cause of action). Congress has ratified this Court's decisions implying such rights of action from Spending Clause statutes. *See Alexander v. Sandoval*, 532 U.S. 275, 280 (2001); *Franklin*, 503 U.S. at 72; *id.* at 78 (Scalia, J., concurring in judgment).

It is true that this Court has sometimes tailored the circumstances under which damages are available in an implied private right of action to preclude such an award when the recipient of federal funds had no actual knowledge that discriminatory conduct was occurring in its programs. *See Davis*, 526 U.S. at 639-640. But it has not required the recipient to have actual knowledge of the remedies available to a prevailing plaintiff. For example, when the Court in *Franklin* held that damages were available for violations of Title IX (contrary to the law of the circuit in which the defendant resided, *see* 503 U.S. at 64), it applied that holding to the case before it.

"hardship for a [defendant]" because they are "limited" to "partially compensating a successful litigant for the expense of his suit." *Hutto v. Finney*, 437 U.S. 678, 697 n.27 (1978). The award in this case, less than $9,000, confirms that permitting prevailing party parents to recover the costs of experts used at the due process and judicial hearings will impose no unexpected burden on school districts.

CONCLUSION

For the reasons set forth above and in respondents' brief, the judgment of the Second Circuit should be affirmed.

Respectfully submitted,

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No. 05-18

IN THE

Supreme Court of the United States

OCTOBER TERM, 2005

ARLINGTON CENTRAL SCHOOL DISTRICT
BOARD OF EDUCATION,

Petitioner

v.

PEARL MURPHY and THEODORE MURPHY,

Respondents

On Writ of *Certiorari* to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* NATIONAL SCHOOL BOARDS ASSOCIATION, AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS, NEW YORK STATE SCHOOL BOARDS ASSOCIATION AND NEW YORK STATE COUNCIL OF SCHOOL SUPERINTENDENTS IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI CURIAE*[1]

The National School Boards Association ("NSBA") is a federation of state associations of school boards from throughout the United States, the Hawai'i State Board of Education, and the boards of education of the District of Columbia and the U.S. Virgin Islands. NSBA represents over 95,000 of the nation's school board members who, in turn, govern the nearly 15,000 local school districts that serve more than 46.5 million public school students, or approximately 90 percent of the elementary and secondary students in the nation. Recognizing that all children, including those with disabilities, have a right to be provided with a free appropriate public education, NSBA has consistently supported the rights of disabled children, while at the same time being fully cognizant of the financial and human resources that its members devote each and every year, above and beyond the partial funding provided by the federal government, for the education of students with disabilities pursuant to the federal Individuals with Disabilities Education Improvement Act, 20 U.S.C. § 1400 *et seq.* (2005) ("IDEA"). The toll that an adversarial and litigious conception of IDEA exacts on school resources confronts NSBA members with more difficult choices

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[1] This brief is filed with the consent of both parties. No counsel for a party authored this brief in whole or in part. No person or entity, other than the *Amici*, their members, or their counsel made a monetary contribution for the preparation or submission of this brief.

among services to all children, including children with disabilities.

The American Association of School Administrators ("AASA"), founded in 1865, is the professional association of over 14,000 local school system leaders across America. AASA's mission is to support and develop effective school administrators who are dedicated to the highest quality education for all children. AASA supports the goals and purposes of the IDEA and therefore is concerned that special education funding be spent to ensure appropriate educational services for children with disabilities and not on legal costs.

The New York State School Boards Association, Inc., ("NYSSBA"), is a not-for-profit membership corporation incorporated under the laws of the State of New York. Its membership consists of approximately ninety-five percent (95%) of all public school districts in New York State. Pursuant to Section 1618 of New York's Education Law, NYSSBA has the responsibility of devising practical ways and means for obtaining greater economy and efficiency in the administration of public school district affairs and projects. Pursuant to this responsibility, NYSSBA often appears as *amicus curiae* before both federal and state court proceedings involving constitutional and statutory issues affecting the administration and operation of public schools, including the education of children with disabilities. NYSSBA believes that the educational needs and interests of children with disabilities must be served appropriately and without delay to help them achieve their place as

active and productive members of society. This can only be achieved if parents and school districts work collaboratively as equal partners who share information and concerns on an ongoing basis, adjusting as necessary, rather than through lengthy litigation where experts battle each other at public expense, and not always in the best interest of children.

The New York State Council of School Superintendents ("NYSCOSS") is a professional association whose membership comprises approximately 96% of all school superintendents in the State of New York. Under New York law, superintendents of schools are the chief executive officers of the state's school districts and are responsible for day to day enforcement and implementation of state and federal law, including the IDEA. As such, NYSCOSS's members play an integral role with their boards of education and the larger community to ensure that children with disabilities in their districts have available to them high quality and appropriate services designed to help these students meet high academic standards. Despite their efforts, school districts are confronted with the ever increasing cost of litigation in special education. Given the obligation of school districts to serve all children, the threat of assuming yet another fiscal liability in the implementation of this important federal law is of great concern. NYSCOSS is particularly concerned that a decision by this Court that concludes that the IDEA authorizes the award of expert fees will undoubtedly encourage litigation against school districts instead of

collaboration in the IEP process as Congress clearly envisioned.

SUMMARY OF ARGUMENT

The issue presented in this case—whether IDEA's attorneys' fees shifting provision authorizes an award of expert witness fees to a prevailing party—is an important one to every school district in New York and throughout the nation. Millions of children in this country are educated according to individualized education programs ("IEPs") created pursuant to the IDEA in what is intended to be a collaborative effort between parents or guardians and school district employees, with the goal of ensuring educational progress and achievement even for this country's most profoundly disabled children.

As Petitioner's brief persuasively argues, the Second Circuit's decision requiring school districts to pay for expert fees incurred by parents is not supported by law. Similarly, the policies underlying the IDEA argue against reading an authorization of expert fee awards into the statute. Fundamentally, the Second Circuit's decision runs contrary to IDEA's tenet that decisions involving the education of students with disabilities be made collaboratively between school district personnel and parents. Congress has repeatedly attempted to move IDEA beyond the adversarial paradigm with which its implementation has been plagued. The Second Circuit's decision subverts the mechanisms that Congress put into the law to promote this cooperative process while ensuring parents are afforded a meaningful opportunity to participate

fully in developing IEPs for their children. The collaborative process ensures that agreement on the educational placement and services for a child with disabilities is reached as expeditiously as possible and provides a means to make adjustments as necessary to meet the child's educational needs.

Authorizing expert fee awards to prevailing party parents instead would result in more litigation and extended hearings, causing increased expenses and delays for school districts and parents alike. Reimbursement of parents' experts will divert already limited resources from where the money belongs: funding educational services for all children. The decision of the Second Circuit in this case must be reversed.

ARGUMENT

I. Recovery of Expert Witness Fees is Contrary to IDEA's Collaborative Framework

The IDEA is a sweeping statute that has opened the doors of public schools to students with disabilities since its initial inception in 1975. Beginning with the process of identifying children with disabilities (commonly referred to as the "child find" process), initial evaluation and identification of students with disabilities, IDEA imposes extraordinarily complex procedural and substantive requirements upon states and local education agencies ("LEAs," usually school districts) that accept federal funding.

The crux of the IDEA is the provision of a free appropriate, public education ("FAPE") to all students with disabilities—a multi-faceted decision that is driven by the unique needs of each student. Deciding what FAPE means for each student is the responsibility of the student's IEP team, which makes decisions by consensus. The IEP team is composed of various school and health professionals involved in the child's education or assessment and always includes the parents. Each IEP is reviewed at least annually by the IEP team, or more often as reasonably requested by any team member. 20 U.S.C. §§ 1400(d)(1)(A) and 1414(d). The IDEA also requires that reevaluations be conducted for all students with disabilities at least once every three years, thus ensuring that the IEP team considers recent information. 34 C.F.R. § 300.321. A student's IEP ultimately is a "living and breathing" document that assesses a student's educational needs, identifies achievement goals and short-term objectives, specifies the special education and related services to be provided in furtherance of those goals, and determines the setting (from full inclusion to residential placement) in which those goals can appropriately be met. To ensure that parents can participate in a meaningful, informed and collaborative manner in decisions about their children's education, the IDEA affords the parents of children with disabilities numerous protections at each and every step, including strict timelines, parent notice and parent consent provisions.

A. The IDEA establishes a collaborative framework for parents and school districts to work together to ensure appropriate educational programs for children with disabilities

The Second Circuit in this case held that allowing the recovery of expert fees is "consistent with the purposes of IDEA. . . ." *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 402 F.3d 332, 358 (2d Cir. 2005). This view fundamentally misunderstands the effect that the recovery of expert witness fees will have on the relationship between the parties to IDEA cases. Instead of promoting a collaborative team approach, the potential availability of expert fees will by its very nature undermine the "cooperative process . . . between parents and schools" that this Court has recognized as the core of the IDEA. *Schaffer v. Weast*, ___ U.S. ___, 126 S.Ct. 528, 532 (2005); *Board of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 205 (1982) (noting that Congress emphasized the full participation of all parties in developing the IEP).

The IDEA contemplates a collaborative relationship between parents, teachers, and special education administrators at every step in the development of a student's IEP and the determination of his or her educational placement and services. 20 U.S.C. § 1414(d). The IDEA sustains this collaborative relationship by affording parents a whole host of rights of which school districts must inform parents in a readable form at

several designated points in the process. The purpose of these rights is to make sure parents are included in the process on an equal footing with other IEP team members and that they have the understanding and information necessary to participate in a meaningful way in determining the course of their child's education.

These rights include: (1) prior written notice a reasonable time before any proposed change is implemented in the child's educational program; (2) notices written in "language understandable to the general public" and in the primary language of the parents; (3) the right to give or withhold consent to evaluation, reevaluation, and placement of the child; (4) parent access to the records relevant to the case and the right to have the records explained, to make copies, and to amend records the parents consider inaccurate, misleading, or an invasion of privacy; (5) the right to be present at and actively participate in every IEP team meeting (in fact, a school district cannot hold an IEP team meeting without the parents unless it has been unable to convince the parents they need to attend and has documented its contacts with the parents by phone, mail and in person, and the results of those contacts); (6) the right to an independent educational evaluation at school district expense; (7) an opportunity for a fair and impartial hearing where parents have the right to be represented by a lawyer or an individual trained in the problems of children with disabilities; the right to present evidence and to subpoena, confront, and cross-examine witnesses; and the right to obtain a transcript of the hearing and a written

decision by the hearing officer; and (8) the right to judicial review and attorneys' fees if the parents prevail. 20 U.S.C. § 1415; 34 C.F.R. §§ 300.129, 300.345 (outlining the methods school districts must use to ensure parent participation in IEP meetings); 34 C.F.R. §§ 300.500-300.517 (providing detailed procedural protections for parents and children); 34 C.F.R. § 300.503(a)(prescribing the contents of the notice containing procedural safeguards); 34 C.F.R. § 300.509 (enumerating the extensive hearing rights parents have before an "impartial hearing officer"). Although the Act requires states to establish an impartial administrative hearing process for the resolution of parental complaints, guarantees certain minimum procedural safeguards, and provides for judicial review, its clear preference is for parents and schools to work together to ensure that children with disabilities are receiving the special education and related services they need. 20 U.S.C. § 1415(a)-(i). Courts have recognized over and over that this collaboration between parents and school districts is critical: "[p]articularly in this difficult area of education for a disabled child, it takes a firm resolve, by parents and educators alike, to work collaboratively, in pursuit of a child's education, even when that collaboration is challenging, choices are limited, and patience runs thin." *Wagner v. Board of Educ. of Montgomery County*, 340 F. Supp. 2d 603, 610 (D. Md. 2004).

B. IDEA's collaborative scheme provides parents early access to independent experts by allowing parent to request at the IEP development stage an independent educational evaluation at school district expense

The IDEA and its implementing regulations already protect parents who do not agree with the results of an evaluation performed by school district personnel or with a decision made by their child's IEP team. Specifically, the regulations implementing IDEA provide that parents may request at any point in the process that an independent educational evaluation ("IEE") be conducted for their child by an independent evaluator, a qualified professional examiner who is not employed or otherwise associated with the school district, at the school district's expense. 34 C.F.R. § 300.502(b); 20 U.S.C. § 1415(b)(1).

When a parent requests an IEE at school district expense, the school district must without undue delay either (1) agree and provide the parent with information about where an IEE may be obtained and the district criteria applicable to IEEs,[2]

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[2] These criteria must be the same as the criteria the district uses itself when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to obtain an IEE. A district may not impose any other conditions or timelines. 34 C.F.R. § 300.502(e)(1), (2). The Office of Special Education Programs of the U.S. Department of Education (OSEP) has said that districts may publish a list of names and addresses of evaluators that meet these criteria, including reasonable cost

or (2) request a due process hearing to dispute the need for an IEE and defend the propriety of its own evaluation. 34 C.F.R. § 300.502 (a)(2), (b) and (e)(1). The federal regulations further protect parents by providing that while a school district "may ask for the parent's reason why he or she objects to the public evaluation... [t]he explanation by the parent may not be required and the public agency may not unreasonably delay either providing the IEE at public expense or initiating a due process hearing to defend the public evaluation." 34 C.F.R. § 300.502(b)(4).

This provision allowing IEEs at public expense is one of the key protections afforded to parents under the IDEA. By providing parents with access to an independent educational expert at district expense, this provision "levels" what many parents argue is an otherwise "unlevel" playing field. In fact, the parents in this case have advanced the notion of an unlevel playing field as one of their primary arguments. The argument goes as follows: since school districts have more resources and qualified staff, parents are at an unfair advantage

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criteria, but the parent has the right to choose which of the evaluators on the list will conduct the IEE. In addition, according to OSEP, districts must allow parents to choose an evaluator who is not on the list but who meets the stated criteria. Parents are even allowed to choose an evaluator who does not satisfy the criteria if they can show unique circumstances that justify doing so. Letter from Patricia J. Guard, Office of Special Education Programs, to Alice D. Parker, Assistant Superintendent, California Department of Education (Feb. 20, 2004) *available at* http://www.ed.gov/policy/speced/guidideа/letter/2004 1/parker022004iee1q2004.doc

when a dispute arises—their only recourse is to hire an expert witness to refute the positions taken by school district personnel. Although some courts have accepted this line of reasoning,[3] it is fundamentally flawed because it is contrary to Congress's emphasis on the collaborative process. It ignores that an IEE is available at any point in the process, especially before there is any adversarial positioning in anticipation of litigation.

School districts are indeed responsible for hiring highly qualified teachers and related service providers (*e.g.*, school psychologists, school social workers, school nurses, occupational therapists, physical therapists, assistive technology personnel, etc.) who are certified and/or licensed by each state. But school districts do not employ such personnel to have an unfair advantage at due process hearings, as the adversarial paradigm might suggest. Rather, they employ such personnel to serve students appropriately. This Court has long recognized that state and local educational officials have the "primary responsibility" for public education. *See Rowley*, 458 U.S. at 230 n. 30. Whatever inherent

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[3] *See, e.g., Brillon v. Klein Indep. Sch. Dist.*, 274 F. Supp. 2d 864, 872 (D. Tex. 2003) ("Many school districts employ child and education experts on staff. If parents were unable to recover their expert fees, they might be unable to hire their own expert to effectively challenge the school district's position, thereby diminishing their ability to protect their rights to 'free appropriate public education ... designed to meet their unique needs.'").

advantages these employees may afford districts when a disagreement does arise with parents of children with disabilities, Congress has already considered them and counterbalanced them by providing parents not only full access to information concerning their child's education, but also the right to request that an independent evaluator weigh in on the issue in dispute, whether that issue pertains to eligibility, placement, services or any combination thereof, at school district expense. Presumably an independent evaluator has no incentive to favor either the district's or the parents' position and will conduct an objective assessment and will arrive at his or her own impartial conclusions and recommendations, in stark contrast to an expert witness hired from the outset to advance the position of one party in an adversarial approach.

Using an independent expert early in the process during the development of the IEP is more likely to lead to a collaborative result and avoid litigation, precisely as Congress intended. Giving parents the right to an independent evaluation at the IEP stage allows objective information to be shared, considered, and discussed by all of the IEP team members in determining appropriate educational services and placement for the child in a cooperative and thoughtful manner. In fact, the law requires that the results of the independent educational evaluation, as well as any other evaluations provided by the parents, be considered by the IEP team in determining a child's eligibility or educational needs. 20 U.S.C. § 1414(c)(1)(A). Whenever the district proposes or refuses to initiate

a change in a child's identification, evaluation, or educational placement or the provision of FAPE to a child, it must provide the parents with a notice that contains, among other information, an explanation for the district's action and a description of each evaluation procedure, assessment, record, or report the agency used in arriving at its decision; and a description of the other options considered by the IEP team and the reason for rejecting those options. 20 U.S.C. § 1415(c)(1).[4] Thus, a school district cannot capriciously or casually disregard the results of an independent educational evaluation. If the district disagrees with the results of the IEE, it must provide the parents with a full explanation for its disagreement.

Congress acted deliberately by explicitly providing for, and requiring districts to pay for, expert input at this early stage when it is of most value in ensuring that children receive the educational services they need as soon as possible, and not when the situation has devolved into the adversarial atmosphere of litigation where parents and their attorneys view it as advantageous to conceal the findings and recommendations of their hired experts until the last moment possible. The end result of the litigious stance is to delay appropriate services to children.

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[4] This information must also be provided whenever a parent files a due process complaint notice, if the district has not previously provided this information to the parent. 20 U.S.C. § 1415(c)(2)(B).

C. "Expert witnesses" hired by parents are by definition not independent and do not advance IDEA's collaborative intent

Expert witnesses by their very function and purpose do not play a collaborative role. In the case of disputes under the IDEA, parents retain an expert witness to advance the parent's position in the form of advocacy. Allowing parents to recoup the cost of expert witness fees will encourage parents to take a "no holds barred" approach to due process hearings and to be less inclined to resolve issues in a cooperative fashion during development of the IEP or through informal dispute mechanisms such as the resolution session, mediation or settlements (see more at pp. 16-17, *infra*). Authorizing such awards would give parents an additional opportunity to obtain expert input at public expense that Congress did not explicitly include in the statute. The availability of expert fees could in fact undermine the effectiveness of the mechanism Congress did provide—the right to IEEs—by encouraging expert shopping. If the results of an IEE do not support the parents' position or desired outcome for their child, the parents would have every incentive to find and hire yet another expert who will support their views and then to push the issue into formal proceedings in the hopes of recovering the expert's fees. When the payment of expert witness fees is at stake, both parties likely will become more firmly entrenched in their positions because the potential financial stakes become that much higher.

Such entrenchment not only undermines the cooperative process envisioned by the IDEA, it will promote litigation that significantly delays the resolution of the issues, and ultimately, the delivery of appropriate services to the child. IDEA has, since its inception, encouraged the resolution of educational disputes "as quickly as possible." *Powers v. Indiana Dep't of Educ.*, 61 F.3d 552, 556 n.3. (7th Cir. 1995). The IDEA favors the resolution of disputes in the most expeditious manner for the sake of the child's education, with full parental participation throughout, in a non-litigious manner. If this Court allows parents to recoup expert witness fees, the IDEA dispute resolution process will shift away from collaboration and toward extended adversarial proceedings, to the detriment of the child.

II. Recovery of Expert Witness Fees Will Lead to Increased Litigation Costs for Parents and Schools and Divert Attention and Resources from the Education of All Children

A. Authorizing the award of expert fees conflicts with congressional intent to reduce litigation costs under the IDEA

When the IDEA was reauthorized in 1997 and 2004, Congress clearly expressed its intent to promote collaboration between parents and school districts and to reduce litigation. 20 U.S.C. § 1400(c)(8) ("Parents and schools should be given

expanded opportunities to resolve their disagreements in positive and constructive ways."). As described above, the IDEA calls for parents' active and informed participation in every step of the development of a student's educational program. 20 U.S.C. § 1414(d). Should a disagreement arise during this process, the IDEA now includes an "opportunity to resolve" requirement. This provision, added in 2004, obliges the parents and the school district to participate in an informal resolution session prior to a due process hearing to provide parents an opportunity to discuss their concerns in an effort to promote early resolution of the issues in dispute. 20 U.S.C. § 1415(f)(1)(B). The IDEA also encourages federal- and state-mandated mediation prior to due process hearings. 20 U.S.C. § 1415(e). These provisions are clearly meant to obviate the need for formal administrative and judicial proceedings.

In addition, Congress has sought to encourage parents to engage in litigation responsibly and not to drive up legal costs to school districts unnecessarily. In 1997, Congress authorized reductions in attorneys' fees awards in certain circumstances, including when parents unreasonably protract the resolution of the dispute and prohibited the award of such fees when parents have rejected settlement offers that prove more favorable than the results obtained through litigation. 20 U.S.C. § 1415 (i)(3)(D), (F). In 2004, it amended the law to permit fee awards against parents and their attorneys for bringing frivolous complaints, thus creating a

disincentive for parents to bring unfounded claims. 20 U.S.C. § 1415(i)(3)(B)(i)(II), (III).

Contrary to Congress's stated goal of reducing litigation costs through informal resolution of IDEA disputes, providing expert witness fee recovery will increase incentives for parents to litigate. Such incentives not only reduce the likelihood of mediated solutions or other cooperative outcomes, but necessarily increase the time and money spent on litigation. Specifically, school districts not only will be required to pay for parents' experts (in cases where parents prevail), but also school districts will be increasingly forced to hire their own experts to refute the positions taken by the parents' experts in due process hearings—even those in which parents do not prevail. Such additional expenses necessarily drain school district budgets and ultimately detract from the educational programs of all students. Clearly this was not the intent of Congress when it adopted the IDEA. *See* 20 U.S.C. § 1400(d)(1)(A)(stating that the purpose of the Act was to "ensure that all children with disabilities have available to them a free appropriate public education. . . ."). Nor is it consistent with Congress's repeated attempts in subsequent reauthorizations of the Act to encourage a collaborative rather than an adversarial approach.

B. Allowing recovery of expert fees will encourage claims for certain kinds of "expert" services for which fees are not traditionally recoverable, thereby engendering additional litigation to resolve fee disputes

Besides increasing litigation on the merits of parental challenges, authorizing the award of expert fees will burden courts with even more litigation involving fee disputes. Courts are already encountering claims under the IDEA for expert witness fees in connection with services not traditionally compensable under fee shifting provisions. One of the most common claims of this type is for the services of a lay advocate. Although arguably the line between an expert witness, educational consultant, and an advocate may sometimes be a fine one, it is clear that under the IDEA, parents are not entitled to reimbursement of fees charged by an advocate or the fees charged by an educational consultant that relate to advocacy. *E.g., L.L. v. Vineland Bd. of Educ.*, No. 04-2022, 128 Fed. Appx. 916, 2005 WL 943527 (3d Cir. June 20, 2005). In fact, the "expert witness" in this case wore dual hats of "educational consultant" and "advocate" and sought compensation for time spent serving in both capacities, despite previous court rulings against her that disallowed fees for time spent providing services similar to an attorney. *Arons v. New Jersey State Bd.*, 842 F.2d 58 (3d Cir. 1988); *Matter of Arons*, 756 A.2d 867 (Del. 2000), *cert.*

denied sub nom., Arons v. Office of Disciplinary Conduct of the Supreme Court of Delaware, 121 S. Ct. 2215 (2001).

If this Court affirms the Second Circuit's decision, the job of parsing out the fees related to each role (which would occur at the fee petition stage of the litigation) will require inordinate amounts of time for both parties, adding to the costs of litigation. Although the Third Circuit in *Arons* characterized this task as not "insurmountable," it is clear from the case law that already exists on this issue that a substantial amount of legal and judicial resources must be expended to resolve such issues. *E.g., A.H. v. South Orange Maplewood Bd. of Educ.*, No. 03-4103, 153 Fed. Appx. 863 (3d Cir. Nov. 7, 2005) (dismissing without prejudice an action filed by educational consultant seeking $1,190,700 in fees since such actions must be submitted by an attorney or by the parties personally and expressing no opinion as to the merits of any future fee claim); *Burgess v. Paterson Bd. of Educ.*, Civ. No. 04-2620, 2005 WL 220290 (D.N.J. Sep. 20, 2005) (reducing educational consultant's claim for fees for the hours she spent as an advocate for the parent, but allowing another consultant to recover all of the fees she claimed because no part of the hours she spent was "easily severable" from those spent on issues on which parents were unsuccessful); *Board of Educ. of Frederick County v. I.S.*, 358 F. Supp. 2d 462, 473 (D. Md. 2005) (finding, based on language in legislative history, that parents could recover cost of educational consultant who did not appear as an expert witness during the due process hearing

because consultant conducted an evaluation and provided parents a report that helped them decide to challenge their child's placement); *Noyes v. Grossmont Union High Sch. Dist.*, 331 F. Supp. 2d 1233, 1251 n. 7 (S.D. Calif. 2004) (finding that parents could recover fees for hours educational consultant spent consulting with their attorney during due process but not for time spent attending an IEP meeting because even attorneys' fees are not available for IEP meetings unless ordered by a hearing officer or court); *B.D. v. DeBuono,* 177 F. Supp. 2d 201, 208-09 (S.D.N.Y. 2001) (halving claim for over $209,000 in expert fees because claim was "exorbitant" given that school district's experts charged only $35,000); *Borough of Palmyra Bd. of Educ. v. R.C.*, No. 97-6119, 31 IDELR ¶ 3 (D.N.J. July 29, 1999) (finding in case brought under section 504 that parents could recover all fees paid to experts who testified at hearing and approximately half the fees paid to educational consultant but excluding consultant's time spent on providing therapy to the parents, attending a workshop on language disorders, inordinate amounts of travel, and rendering legal services); *Connors v. Mills,* 34 F. Supp. 2d 795, 808 (N.D.N.Y. 1998) (denying fee award to non-attorney advocate because claim did not differentiate between time spent on legal representation and that pertaining to consultation and advice, and finding that allowing award of fees for time spent on legal representation when no specific standards govern qualifications of lay advocates would inure to the benefit of those who are incompetent and unscrupulous).

The decisions on this issue also reveal that even where a court determines that reimbursement of expert fees is authorized by the IDEA, there remains significant confusion about how to resolve expert fee claims for various types of services. *Id.* This is amply demonstrated in the following excerpt from a recent decision by a U.S. District Court in New Jersey:

> [New Jersey] law precludes a lay advocate from receiving fees for "legal representation" of a party during a special education hearing. However, courts in this circuit have interpreted the IDEA's fee-shifting to authorize the award of reasonable expert fees to a prevailing party provided the expert work was essential to the preparation of the plaintiff's case. *See, e.g., id.* at 62; *P.G. v. Brick Twp. Bd. of Educ.*, 124 F. Supp. 2d 251, 267 (D.N.J. 2000). Therefore, even though a state regulation prohibits lay advocates from receiving fees for legal representation in IDEA due process proceedings, neither state nor federal law categorically bars those same individuals from receiving fees for work performed as an expert or consultant in preparation for such hearings.

C.H. v. Jefferson Twp. Bd. of Educ., 44 IDELR 249, 251 (D.N.J. 2005).

The *C.H.* case illustrates perfectly how awarding expert witness fees to prevailing parents will be fraught with dispute. The district court in *C.H.* held that the parents' advocate could simply present herself as the parents' expert or consultant to recoup fees. The parents' advocate billed the family $14,980.00 for her services, claiming 42.8 hours of work at an hourly rate of $350.00. The district court ultimately denied the parents' petition for fees without prejudice in order to allow them to submit proper documentation in support thereof (invoices, affidavits, etc.).

In the opinion of the *C.H.* court, an advocate simply needs to call herself an "educational consultant" or an "expert" to be entitled to fees if the parents prevail. Such rulings unfortunately serve to add an absurdly artificial form of litigious gamesmanship to a process that Congress intended to be collaborative and expeditious for the benefit of disabled children. *See Moubry v. Independent Sch. Dist. 696*, 9 F. Supp. 2d 1086, 1113 (D. Minn. 1998) ("While the IDEA has an inherent proclivity toward an adversarial approach, nevertheless, with the cooperative efforts of all concerned, the hallmark of the IDEA approach—namely, a collaborative process by parents and educators alike, so as to assure an instructional advancement greater than the sum of the individualized contributions—can be achieved toward the [student]'s best, and necessarily continuing, educational interests.").

C. Litigation expenditures divert valuable resources from special and general education

Public school systems support and advocate the provision of FAPE to students with disabilities. This Court has already recognized that the provision of special education programming and related services does not come cheap. *Schaffer*, 126 S. Ct. at 535 ("there is reason to believe that a great deal is already spent on the administration of the [IDEA]"). In fact, the United States Department of Education reports that public school systems spent approximately $78 billion educating special education students during the 1999-2000 school year alone. *See* U.S. DEP'T OF EDUC. TWENTY-FOURTH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES ACT at I-20 to I-23 (2002). Not only is this nearly 22% of elementary and secondary schools' total spending, it is double that spent on all other student populations. *Id.* These costs are borne primarily by state and local governments. While the federal government committed to funding 40% of the per pupil special education costs when it first enacted the predecessor statute to the IDEA in 1975, more than 30 years later, it still funds less than 20 percent of those costs, creating a cumulative funding gap of more than $59 billion for the last four fiscal years. NSBA, *Priority Issue: Federal Funding for Education* (Jan. 2006), *available at* www.nsba.org/site/docs/35100/35033.pdf

Costly litigation undermines the efforts of public schools to educate children with disabilities by siphoning already scarce resources from their budgets. In addition to educational costs, schools spend an average of $8,160 - $12,200 for each due process hearing[5] or mediation and nearly seven times that on litigation in federal court.[6] In school year 1999-2000 school districts spent approximately $146.5 million on special education mediation, due process proceedings, and litigation under the IDEA. *See* JAY G. CHAMBERS ET AL., CENTER FOR SPEC. EDUC. FINANCE, SPEC. EDUC. EXPENDITURE PROJ., WHAT ARE WE SPENDING ON PROCEDURAL SAFEGUARDS IN SPECIAL EDUCATION, 1999-2000 at 8 (May 2003). These costs will increase dramatically if school districts are forced to bear the cost of parent-retained experts.[7] Rather than furthering the

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[5] Other documentation suggests that these estimated costs are actually much higher. *See* David Gruber, *Communication and Conflict Resolution Skills Can Lead to Lasting Relationships for Children*, FOCUS ON RESULTS (Mich. Dep't Spec. Educ. & Early Intervention), *available at* http://www.cenmi.org/focus/dispute/article_05-02.asp (estimating the average cost of a due process hearing at around $25,000 to $40,000).

[6] This does not include the non-monetary cost to students, as their teachers are pulled from their classrooms to prepare for, and participate in, due process hearings, mediations, and other litigation. The average due process hearing lasts one to two weeks. *See* Perry A. Zirkel, *Transaction Costs and the IDEA*, EDUCATION WEEK, May 21, 2003 at 44.

[7] The Murphy's consultant in this case claimed approximately $30,000 in expert fees. Although the district court awarded less than $9,000 to the consultant, the school district has incurred additional legal fees to defend against her claim.

IDEA's goal of affording additional educational opportunities to special education students, reading a litigation cost into the statute for which Congress did not explicitly provide will only divert even more valuable resources from both special and general educational programs. As a result, "Congress has . . . repeatedly amended [IDEA] in order to reduce its administrative and litigation-related costs." *Schaffer*, 126 S. Ct. at 535.[8] To uphold the Second Circuit's ruling would constitute a departure from this congressional direction, as well as this Court's interpretation of the IDEA.

Experts in other cases cost even more. *See* John Madewell, *U.S. Court of Appeals Rules in Favor of Parents With Autistic Child*, News Channel 9 WTVC, *available at* http://www.news channel9.com/engine.pl?station=wtvc$id=880$template=pagesearch.shtml (last visited Feb. 17, 2006) (parents' expert witness cost $48,000; parents' doctor cost $18,000).

[8] *See* Zirkel, *supra*, n. 6 (discussing opposition of special education lawyers, publishers, and related cottage industries to "an expedited economical and expert system of dispute resolution [under the IDEA] that resolves rather than fosters 'adversariality' and maximizes the limited time and resources for services to students with disabilities").

CONCLUSION

For the foregoing reasons, *Amici* urge that the Second Circuit's opinion be reversed.

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IN THE

Supreme Court of the United States

ARLINGTON CENTRAL SCHOOL DISTRICT
BOARD OF EDUCATION,
Petitioner,

v.

PEARL AND THEODORE MURPHY,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

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QUESTION PRESENTED

Does the cost-shifting provision of the Individuals with Disabilities Education Act, 20 U.S.C. 1415(i)(3)(B), which provides that a court may "award reasonable attorneys' fees as part of the costs to the parents" who are prevailing parties, authorize an award of expert costs?

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Hearing on S. 415 Before the Subcomm. on the Handicapped of the S. Comm. on Labor and Human Resources, 99th Cong. (1985) 36

S. 2895, 98th Cong. 2 (1984) 35

Miscellaneous:

Am. Bar Ass'n, Comm'n on Nonlawyer Practice, *Nonlawyer Activity in Law Related Situations: A Report with Recommendations* (1995) 7
Hon. Robert A. Katzmann, *Courts and Congress* (1997) .. 40
U.S. Gen. Accounting Office, *Special Education: The Attorney Fees Provision of Public Law* 99-372 (Nov. 1989) 19
Webster's Third New International Dictionary 490 (1981 ed.) 19

PRELIMINARY STATEMENT

Respondents Pearl and Theodore Murphy are the parents of Joseph Murphy, a child with disabilities. The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400–1487 (2000), obligates school districts to provide children with disabilities a "free appropriate public education." *Id.* 1412(a)(1). When the Murphys and petitioner Arlington Central School District Board of Education reached an impasse over the appropriate educational placement for Joe, the Murphys invoked IDEA's due process provision and prevailed. The Murphys could not have succeeded without their educational expert's assistance.

The question before the Court is whether IDEA's cost-shifting provision, 20 U.S.C. 1415(i)(3)(B), authorizes the Murphys to recover the cost of their expert's participation. The answer is yes. The text, history, and purpose of Section 1415(i)(3)(B) demonstrate that it empowers courts to award parents the costs of experts. Because Congress authorized these awards, petitioner's contention that *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83 (1991), controls this case misses the mark.

The evidence that Congress authorized prevailing parents to recover expert costs is overwhelming. Congress added Section 1415(i)(3)(B) to IDEA in 1986 when it enacted the Handicapped Children's Protection Act (HCPA) to overturn *Smith v. Robinson*, 468 U.S. 992 (1984). *Smith* had held that attorneys' fees were unavailable to prevailing parents under the then-current version of IDEA. Congress responded in the HCPA first by authorizing awards of "attorneys' fees as part of the costs to the parents" in Section 1415(i)(3)(B). Then, in a provision of the HCPA petitioner disregards, Congress underscored that the phrase "the costs to the parents" includes expert costs by directing the General Accounting Office (GAO) to report on the "attorneys' fees, costs, and expenses awarded" to prevailing parents and "the

number of hours spent by personnel, including attorneys and consultants" in IDEA proceedings. P.L. 99-372, § 4(b)(3), 100 Stat. 796, 797–98 (1986). Taken together, these provisions demonstrate that Congress used "costs" in its ordinary sense — to cover the expenses parents incur in IDEA proceedings, including the costs of consultants and experts — and not as a restrictive legal term of art.

The history of Section 1415(i)(3)(B)'s implementation confirms this reading. Courts uniformly understood IDEA to permit awards of expert costs. The GAO Report recognized that expert costs were recoverable. And during Congress' deliberations on the HCPA, there was bipartisan consensus that prevailing parents should recover the costs of experts — a consensus reflected in uncontradicted statements in the House, the Senate, and the Conference Report.

The Murphys' reading of the statute gives effect to the text of Section 1415(i)(3)(B) and is consistent with IDEA's core goal: providing children with disabilities a free, appropriate public education. The same cannot be said of petitioner's interpretation, which rewrites Section 1415(i)(3)(B) to provide for attorneys' fees and nothing more, and precludes parents from recovering expert costs, even though they need expert assistance to vindicate their right to participate in IDEA proceedings. Petitioner's reading thus imperils the fair resolution of due process hearings and subverts IDEA's core goal of ensuring that children with disabilities receive an education that is both appropriate and free.

STATUTORY PROVISIONS INVOLVED

Petitioner's rendition of the statutes involved omits relevant provisions of the HCPA, P.L. 99-372, 100 Stat. 796, which amended IDEA.[1]

HCPA Section 2 (codified as amended at 20 U.S.C. 1415(i)(3)(B)) provided:

> In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parent or guardian of a handicapped child or youth who is the prevailing party.

HCPA Section 3 (codified as amended at 20 U.S.C. 1415(*l*)) (citation omitted) provided:

> Nothing in this title shall be construed to restrict or limit the rights, procedures, or remedies available under the Constitution, title V of the Rehabilitation Act of 1973, or other Federal statutes protecting the rights of handicapped children and youth * * * *

HCPA Section 4, *reprinted in* 20 U.S.C. 1415 *note* (citation

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[1] IDEA was reauthorized and amended in 2004. P.L. 108-446, 118 Stat. 2647. The operative language of the cost-shifting provision was not materially changed. It now reads: "In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs – (I) to a prevailing party who is the parent of a child with a disability . . . ." 20 U.S.C.A. 1415(i)(3)(B) (West 2005). Petitioner does not contend that this change is significant. Unless otherwise noted, citations are to the 2000 United States Code.

omitted), provides:

> (a) The Comptroller General of the United States, through the General Accounting Office, shall conduct a study of the impact of the amendments to the Education of the Handicapped Act made under section 2 of this Act * * * *
>
> (b) The report authorized under subsection (a) shall include the following information: * * * *
>
> > (3) Data, for a geographically representative selective sample of States, indicating (A) the specific amount of attorneys' fees, costs, and expenses awarded to the prevailing party, in each action and proceeding under section 615(e)(4)(B) from the date of the enactment of this Act through fiscal year 1988, and the range of such fees, costs, and expenses awarded in the actions and proceedings under such section, categorized by type of complaint and (B) for the same sample as in (A) the number of hours spent by personnel, including attorneys and consultants, involved in the action or proceeding, and expenses incurred by the parents and the State educational agency and local educational agency.

STATEMENT OF THE CASE

A. Individuals with Disabilities Education Act

In 1986, Congress added the relevant statutory text to IDEA by enacting the HCPA. The HCPA and its history are discussed in detail below. To put the dispute between the Murphys and Arlington Central in context, however, we provide a brief overview of IDEA.[2]

IDEA was enacted to address Congress' concern that "more than one-half of the children with disabilities in the United States do not receive appropriate services." 20 U.S.C. 1400(c)(2)(B). It sought to ensure "that all children with disabilities have

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[2] IDEA's roots trace back to the Education of the Handicapped Act (EHA), P.L. 91-230, 84 Stat. 175 (1970), which was Congress' first effort to address the needs of children with disabilities. But EHA did not stem the tide of overt discrimination in education against these children. Parents and civil rights groups began turning to the federal courts, where they won substantial relief in two path-breaking decisions: *Mills v. Board of Education of the District of Columbia*, 348 F. Supp. 866 (D.D.C. 1972) and *Pennsylvania Ass'n for Retarded Children v. Pennsylvania* (*PARC*), 334 F. Supp. 1257 (E.D. Pa. 1971), and 343 F. Supp. 279 (E.D. Pa 1972). The courts in these cases concluded (*PARC* through a consent decree) that systematic discrimination against children with disabilities in the provision of public education violated the equal protection and due process guarantees of the Fourteenth Amendment. *Mills*, 348 F. Supp. at 875; *PARC*, 343 F. Supp. at 279. The courts ordered an end to discrimination and entered broad injunctive relief. *Id.* In the wake of these decisions, Congress substantially overhauled the EHA with the passage of the Education for All Handicapped Children Act of 1975 (EAHCA), P.L. 94-142, 89 Stat. 773. For a detailed history of the statute's early evolution, including the impact these cases had on the EAHCA, see *Hendrik Hudson Central School District Board of Education v. Rowley*, 458 U.S. 176, 179–80 (1982). In 1990, Congress changed the title of the statute to the Individuals with Disabilities Education Act. P.L. 101-476, § 901(a)(1), (3), 104 Stat. 1103, 1141–42.

available to them a free appropriate public education" and "that the rights of children with disabilities and parents of such children are protected." *Id.* 1400(d)(1)(A)–(B). As this Court has recognized, IDEA "confers upon disabled students an enforceable substantive right to public education." *Honig v. Doe*, 484 U.S. 305, 310 (1984); *see also Rowley*, 458 U.S. at 180, 192–200.

Two provisions of IDEA are relevant here. First, Section 1414 sets forth procedures to identify and evaluate children with disabilities and determine what constitutes an appropriate education. Once a child with disabilities has been identified, IDEA requires the school district to prepare an "individualized educational program" (IEP) that, among other things, describes the educational and related services to be provided to the child, establishes annual goals to assess whether the child is making progress, and determines the child's appropriate educational placement. 20 U.S.C. 1414(d). Congress intended parents to participate in the development of their child's IEP. *Id.* 1414(d)(1)(B)(i).

Second, anticipating that disagreements would arise between parents and schools, Section 1415 establishes procedural protections that must be afforded to the parties. Parents are entitled to written notice whenever a school either proposes or refuses "to initiate or change" a child's IEP. *Id.* 1415(b)(3). If an impasse arises over any element of the IEP, parents have the right to "an impartial due process hearing." *Id.* 1415(f)(1). Due process hearings are initiated by the submission of a formal complaint, to which the school must respond. *Id.* 1415(b)(6)–(7). In the event that dispute resolution fails, a due process hearing is held before an impartial hearing officer independent of the school. *Id.* 1415(f)(1), (3).

Section 1415 also establishes a number of "safeguards" to ensure procedural fairness during hearings. Parties have "the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities." *Id.* 1415(h)(1). In practice, parents are often unrepresented by counsel in IDEA hearings, although school districts generally have counsel.[3] Parties have "the right to present evidence and confront, cross-examine, and compel the attendance of witnesses." *Id.* 1415(h)(2). A complete transcript or recording must be made of the hearing and provided to parents on request, and findings of facts and decisions must be in writing. *Id.* 1415(h)(3)–(4). In states like New York, which opt for a two-tier system, adverse rulings may be appealed to the state educational agency. *Id.* 1415(g).

Any party aggrieved by the results of the administrative process may file suit in either federal or state court. *Id.* 1415(i)(2)(A). Judicial review is based on the record of the due process hearing, with limited opportunity for supplementation. *Id.* 1415(i)(2)(B). Courts generally resolve IDEA cases on summary judgment, even when evidence compiled during the due process hearing is conflicting. *See, e.g., Beth B. v. Van Clay*, 282 F.3d 493, 496 n.2 (7th Cir. 2002).[4]

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[3] *See* 150 Cong. Rec. S5351 (daily ed. May 12, 2004) (reporting that parents are represented by counsel in about one-third of the due process hearings held in New York and Illinois, while school districts have lawyers in virtually all cases); *see also* Am. Bar Ass'n, Comm'n on Nonlawyer Practice, *Nonlawyer Activity in Law Related Situations: A Report with Recommendations* 81 (1995) (reporting that "[i]n many communities there appear to be few, if any, lawyers experienced or willing to handle" IDEA cases for parents).

[4] *Rowley* held that courts must give "due weight" to the findings of the state administrative proceeding and should not "substitute their own

(continued...)

B. Proceedings Below

1. The Murphys' son Joe is a child with learning disabilities.[5] The Murphys live in upstate New York and have modest means, with a total income of around $47,000.[6] This controversy arose in September 1997, when Joe was in eighth grade. At the beginning of the school year, a speech/language specialist found Joe to be "severely functionally language disordered." *SRO Decision* at 6. A neuropsychologist also evaluated Joe and reported that he had a "near total incapacity to process language, written or oral." *Id.* At the end of eighth grade, Arlington Central's speech/language evaluator concluded that Joe was a

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(...continued)
notions of sound educational policy for those of the school authorities they review." 458 U.S. at 206; *see also Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 201 (3d Cir. 2004); *L.B. v. Nebo Sch. Dist.*, 379 F.3d 966, 974 (10th Cir. 2004). Ordinarily, parties are not permitted to supplement the record or to have witnesses testify in review proceedings unless they can show prejudice or that the evidence was unavailable at the time of the state hearing. *See, e.g., West Platte R-II Sch. Dist. v. Wilson*, No. 05-1973, 2006 WL 488410, at *2 (8th Cir. Mar. 2, 2006); *Springer v. Fairfax County Sch. Bd.*, 134 F.3d 659 (4th Cir. 1998); *Town of Burlington v. Dep't of Educ.*, 736 F.2d 773 (1st Cir. 1984).

[5] This recitation is drawn from the decision of the State Review Officer (SRO), which is in the record (*see* Exhibit A to the Status Report filed by Arlington Central on Dec. 28, 1999 (Docket Entry 8)), and is available at http://www.sro.nysed.gov/1999/99-065.htm (last visited on Mar. 22, 2006) (*SRO Decision*).

[6] *See* Joint Appendix in *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, CV-00-7358, 297 F.3d 195 (2d Cir. 2002), at 19 (certification of Pearl Murphy, dated Aug. 6, 1999, attached to plaintiff's motion to show cause, dated Sept. 7, 1999); *id.* at 110 (transcript of hearing on plaintiff's show cause motion in *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, No. CV-99-1258 (Sept. 7, 1999)).

"high risk" student both academically and emotionally and recommended that he be placed in a residential school for language impaired students. *Id.* at 8.[7]

Arlington Central nonetheless proposed an IEP that would place Joe in Arlington High School in classes with other students with disabilities. *Id.* at 9. To help them evaluate Joe's educational options, the Murphys retained Marilyn Arons, an educator who has worked on special education matters since 1963.[8] Arons reviewed Joe's evaluations, conducted her own assessment, attended IEP meetings and met with school officials to urge Arlington Central to provide Joe with more intensive speech/language training. *Id.* When Arlington Central failed to do so, the Murphys enrolled Joe in the Kildonan School, a private school for learning disabled students. At the same time, the Murphys filed an IDEA administrative complaint *pro se* seeking a due process hearing to establish Kildonan as Joe's appropriate placement and to compel Arlington Central to reimburse his tuition. *Id.*

The Murphys did not have counsel at the due process hearing, which stretched over six days in October 1998 and was

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[7] Joe's problems in school had started years earlier. He had "attention difficulties" in kindergarten, he was "diagnosed by a neurologist as having Attention Deficit Hyperactivity Disorder" in second grade, and he had to repeat third grade. *SRO Decision* at 1–2. By fourth grade, Joe was classified as "learning disabled." *Id.* at 3. The SRO Decision gives a full account of Joe's difficulties in school. *Id.* at 1–6.

[8] Arons holds a masters degree in early childhood education and had been qualified as an expert in prior proceedings. *Borough of Palmyra Bd. of Educ. v. R.C.*, No. 97-6199, 31 IDELR ¶ 3 (D.N.J. 1999); *see* Pet. App. at 21a–22a, 35a.

reconvened for several more days in April 1999. *Id.* at 9–10.[9] Arlington Central had counsel. *Id.* Arons did not testify at the hearing but did assist the Murphys in reviewing Joe's educational evaluations, framing questions for the school board's experts, and preparing their affirmative case. JA 23a–28a; 63a–66a. On July 7, 1999, the impartial hearing officer held that the Kildonan School, not Arlington High School, was the appropriate placement for Joe. *SRO Decision* at 9–10. The ruling required Arlington Central to reimburse the tuition the Murphys had already paid for the 1998–1999 school year. *Id.* Arlington Central appealed to the State Review Officer (SRO) on August 18, 1999, thereby staying the reimbursement order.

2. Meanwhile, the start of the 1999–2000 school year was approaching and the Murphys could not afford to continue to pay Joe's tuition. Still proceeding *pro se*, the Murphys filed an action in district court to require Arlington Central to pay Joe's tuition while its appeal to the SRO was pending. Before the district court ruled, the SRO affirmed. *Id.* at 13–16. Arlington Central did not reimburse the Murphys for the 1998–1999 tuition until the district court issued a show cause order in late January 2000 —

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[9] New York law permits non-lawyers to assist parents to advocate their claims in due process hearings. *SRO Decision* at 9. Arons helped the Murphys in this capacity as well. *Id.* Arons' certification, submitted in support of the Murphys' request for costs, makes clear that compensation was sought only for those services rendered in her capacity as an expert in special education matters, not as an advocate. JA at 20a–33a; 63a–66a. In so doing, Arons followed the line between compensable and non-compensable activities drawn in *Arons v. New Jersey State Board of Education*, 842 F.2d 58, 62–63 (3d Cir. 1988) (finding educational expert may receive fees as an expert consultant or witness, but may not for legal services).

halfway into the next school year.[10]

The parties remained divided over Joe's placement (and the liability for his tuition) for the 1999–2000 school year. To resolve that issue, the Murphys requested a new due process hearing and, in the still-pending district court action, invoked IDEA's "stay put" provision to require Arlington Central to pay Joe's tuition. The Murphys contended that the SRO's ruling had changed Joe's IEP to provide that his placement was Kildonan; Arlington Central argued that the SRO's ruling applied only to the prior school year. The district court agreed with the Murphys and directed Arlington Central to pay Joe's tuition pending a final determination of the Murphys' IDEA claim. *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 86 F. Supp. 2d 354, 358–359 (S.D.N.Y. 2000). The Second Circuit affirmed. 297 F.3d 195 (2d Cir. 2002).[11]

3.a. Following that ruling, with all other issues now resolved, the Murphys filed a motion in the district court to recover $29,350 for the services that Arons provided as an expert.

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[10] *See Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, No. CV-99-9294 (S.D.N.Y. Jan. 24, 2000). Arlington Central challenged the SRO's decision in state court and lost. *See In re Arlington Cent. Sch. Dist. v. State Review Officer*, Index No. 1212/2002 (N.Y. Sup. Ct. Dutchess County, Sept. 13, 2002).

[11] The Murphys had counsel on the 2002 appeal to the Second Circuit. As noted, they proceeded *pro se* in all other proceedings. The undersigned counsel of record participated as counsel for amici in support of the Murphys' position in the 2005 Second Circuit appeal and became counsel for the Murphys after Arlington Central filed its petition for certiorari.

JA at 20a–33a; 63a–66a.[12] The district court accepted Arons' qualifications as "'a professional educator [who] ... specializes in curriculum development for exceptional children.'" Pet. App. 21a (quoting *Arons*, 842 F.2d at 62–63). But it cut the request substantially, not because the Murphys sought compensation for Arons' advocacy efforts as petitioner suggests, but because her services as an expert were rendered either before the commencement of the due process hearing (September 1998) or after the district court's initial ruling in the Murphys' favor (March 2000). In the court's view, only services provided between these two events were rendered in an "action or proceeding," as IDEA requires. *Id.* at 37a–38a. The judge added, "nothing I have said in this opinion or the result I have reached should be regarded as a denigration of Marilyn Arons's abilities or the devoted services she rendered to the Murphy family. I have no doubt that those services were worth over $29,000." *Id.* at 41a–42a.

The district court found that Arons spent 43.25 hours assisting the Murphys prepare for and participate in the due process hearing. *Id.* at 38a. The court concluded that Arons' work helping the Murphys understand the submissions of the school board's experts, reviewing technical materials that would be relied on in the hearing, and formulating questions to use in cross-examining the school board's experts, qualified as reimbursable expert costs. *Id.* at 22a, 39a–40a. Finding $200 per hour a proper valuation of Arons' expert services, *id.* at 40a–41a, the court awarded the Murphys $8,650. *Id.* at 41a. Arlington Central appealed; the Murphys did not cross appeal.

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[12] For reasons not apparent in the record, the Murphys did not seek reimbursement for the costs of the services provided by Gerald Brooks, a speech/language pathologist, who prepared a report and testified on their behalf. *SRO Decision*, at 11–12.

3.b. The Second Circuit affirmed, holding that the IDEA authorizes courts to award expert costs to prevailing parents. Pet. App. at 2a. It first examined this Court's rulings in *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987), and *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83 (1991), which held that, unless Congress specifies otherwise, a statutory authorization for attorneys' fees does not encompass expert costs. Pet. App. at 8a–9a. The court noted that, in contrast to 42 U.S.C. 1988, the statute at issue in *Casey*, Congress had left no doubt that expert costs were to be reimbursed to prevailing parents under the IDEA. Pet. App. at 9a–10a. This conclusion was based in part on the Joint Statement of the Conferees, which made explicit that expert costs were recoverable under IDEA. *Id.* at 9a. The court also observed that "[e]xpert testimony is often critical in IDEA cases, which are fact-intensive inquiries about the child's disability and the effectiveness of the measures school boards have offered to secure a free appropriate public education." *Id.* at 12a. The availability of expert costs would thus be in keeping with IDEA's remedial purpose. *Id.* at 13a–14a.

SUMMARY OF ARGUMENT

The question in this case is whether parents like the Murphys may recover the costs of the expert who assisted them in a due process hearing involving the highest stakes imaginable — their child's future. The statute's text, history, and purpose all point to the conclusion that IDEA authorizes prevailing parents to recover expert costs.

I. IDEA provides that "in any action or proceeding brought" under the Act, "the court, in its discretion, may award reasonable attorneys' fees *as part of the costs to the parents* of a child with a disability...." 20 U.S.C. 1415(i)(3)(B) (emphasis added). The

most natural reading of the phrase "the costs to the parents" encompasses all expenses parents incur in IDEA proceedings, including the cost of experts.

This reading is confirmed by Congress' direction to the GAO to study the legislation's fiscal impact and to report to Congress on the "amount of the attorneys' fees, costs, and expenses" awarded in IDEA litigation, as well as the number of compensable hours spent by "attorneys and consultants" involved in the proceeding. This instruction would make no sense unless Congress intended expert consultants to be reimbursed. The GAO Report states that "[e]xpert witness fees" are "examples of reimbursable expenses" under the Act.

This reading also gives substance to IDEA's overarching goals of ensuring that children with disabilities are provided "a free appropriate public education" and that the rights of children and parents are safeguarded. Reading IDEA's cost-shifting provision to *exclude* expert costs would be manifestly at odds with the Act's requirement that schools provide a "free" education. *See, e.g., Burlington Sch. Comm. v. Mass. Dep't of Educ.*, 471 U.S. 359, 369 (1985). Parents need expert assistance to challenge school determinations, *Schaffer v. Weast*, 126 S. Ct. 528, 536 (2005), but many parents cannot afford to pay experts. If costs for experts are unavailable, these parents will be deprived of their right to challenge school decisions that deny their child's right to an appropriate education, a result Congress could not have possibly intended. *Burlington*, 471 U.S. at 369.

Petitioner's reading violates several cardinal rules of statutory construction. Petitioner analyzes the language of IDEA through the lens of 42 U.S.C. 1988, even though the two statutes are quite different in language and purpose. Petitioner argues that Section 1415(i)(3)(B) authorizes the award of *only* attorneys' fees,

thereby rendering the phrase "as part of the costs to the parents" meaningless. And petitioner's reading undermines IDEA's goals by precluding parents from recovering the costs of expert assistance, even though that assistance is essential to the fair resolution of IDEA due process hearings.

II. The history of Section 1415(i)(3)(B)'s implementation confirms that Congress authorized parents to recover expert costs. The GAO read it in that manner. And courts uniformly held that it empowered them to award expert costs. Indeed, for fifteen years following Section 1415(i)(3)(B)'s enactment, courts were nearly unanimous in holding that it provides for the payment of expert costs. This history belies petitioner's central claim that Section 1415(i)(3)(B) "unambiguously" fails to authorize courts to award expert costs to prevailing parents.

The drafting history of the HCPA reaffirms that Congress authorized the award of expert costs to parents. Although there were controversial issues that slowed the HCPA's passage, there was bipartisan agreement in both Houses at every stage of Congress' deliberations that prevailing parents should recover expert costs. The Joint Statement crystallizes Congress' judgment: "The conferees intend that the term 'attorneys' fees as part of the costs' include reasonable expenses and fees of expert witnesses and the reasonable costs of any test or evaluation which is found necessary to the preparation of" the parents' case, "as well as traditional costs incurred in the course of litigating a case." H.R. Conf. Rep. No. 99-687, at 5 (1986).

III. Contrary to petitioner's claim, nothing in *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987), or *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83 (1991), informs the meaning of Section 1415(i)(3)(B). *Casey* involved statutes that are different in text and language from IDEA, and the

HCPA was enacted before either case was decided. "[Courts] are to read the words of [statutory] text as any ordinary Member of Congress would have read them." *Chisom v. Roemer*, 501 U.S. 380, 405 (1991) (Scalia, J., dissenting); *see MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 228 (1994). Nothing in the language or history of the HCPA suggests that the "ordinary Member[s] of Congress" who participated in its enactment anticipated the narrow, term-of-art meaning these later rulings gave to the phrase "attorneys' fees as part of costs." This point takes on special force because *Casey* rejected the argument (not presented here) that expert fees are recoverable as part of the attorneys' fees parties incur in federal court litigation, not as part of the "the costs ... parents" incur in state administrative proceedings.

Nor does *Casey*'s rationale apply to IDEA. *Casey* held that 28 U.S.C. 1821(b) and 1920 — which fix compensation for witnesses in federal court proceedings — govern expert fees in civil rights cases because Congress did not express an intent to repeal these provisions when it enacted Section 1988. 499 U.S. at 83. But *Casey*'s repeal-by-implication rationale has no application to IDEA. Sections 1821 and 1920 apply only in *federal court* actions, not in state due process proceedings. If accepted, petitioner's argument would deprive parents of *any* opportunity to recover the costs they incur in due process hearings — a result flatly at odds with Congress' clear intent.

IV. Petitioner's invocation of the Spending Clause is untimely, incorrect, and beside the point. It was not raised below and thus is forfeited. It is incorrect because neither the HCPA nor IDEA is *exclusively* a Spending Clause statute. *See, e.g., Cedar Rapids County Sch. Dist. v. Garrett F.*, 526 U.S. 66, 76–77 (1999); *Burlington*, 471 U.S. at 369; *Rowley*, 458 U.S. at 180, 192–200. And it is beside the point because the Spending Clause

requires Congress to give states fair notice of their fiscal obligations when they accept federal grants. Section 1415(i)(3)(B) did just that.

ARGUMENT

I. The Text of IDEA Confirms That Expert Costs May Be Recovered By Prevailing Parents.

A. Section 1415(i)(3)(B) Authorizes the Payment of Expert Costs.

1. Statutory language is the starting point in any case of statutory construction. *Leocal v. Ashcroft*, 543 U.S. 1, 8 (2004). Section 1415(i)(3)(B) of IDEA provides that, "[i]n any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees *as part of the costs to the parents* of a child with a disability who is the prevailing party." (emphasis added).

Statutory language should be given its most natural reading. *Rousey v. Jacoway*, 125 S. Ct. 1561, 1568 (2005); *see also Chisom*, 501 U.S. at 405 (Scalia, J., dissenting) ("Our job begins with a text that Congress has passed and the President has signed. We are to read the words of that text as any ordinary Member of Congress would have read them ... and apply the meaning so determined.") (citation omitted). Read in this light, the words "attorneys' fees as part of the costs to the parents" authorize reimbursement of all costs parents incur in IDEA proceedings, including expert costs. The language is categorical. There is no textual basis for distinguishing the cost of hiring an expert from any other cost parents incur in IDEA proceedings. Expert costs, like attorneys' fees, are indisputably "part of the costs" parents incur in an action or proceeding brought under IDEA. Experts

are not provided to parents free-of-charge under IDEA. Nor are experts good Samaritans who volunteer their services without compensation. Reading IDEA's text in accordance with its "ordinary or natural reading," *Leocal*, 543 U.S. at 1, 9 (2004), yields only one conclusion: Expert costs are reimbursable because they are "*part* of the costs to the parents." *See also Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 298 (D.C. Cir. 2003) ("[S]tatutes written in broad, sweeping language should be given broad, sweeping application") (citation omitted).

2. The GAO report provision confirms this reading. In the HCPA, Congress directed the GAO to study and report on the "attorneys' fees, costs, and expenses awarded to the prevailing party" in a representative sample of states, and to include information about "the number of hours spent by personnel, including attorneys and *consultants*, involved in the action or proceeding." P.L. 99-372, § 4(b)(3), 100 Stat. 796, 797–98 (1986) (emphasis added).

This Court has repeatedly stressed that the "[i]nterpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis." *Dolan v. United States*, 126 S. Ct. 1252, 1257 (2006).[13] Nonetheless, petitioner and the United States ignore this provision, even though it sheds considerable light on Section 1415(i)(3)(B). By instructing the GAO to study the "attorneys' fees, costs and expenses" awarded in IDEA cases, including the time spent by "attorneys and consultants," Congress signaled that

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[13] *See also Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60 (2004) ("Statutory construction is a 'holistic endeavor.'") (citations omitted); *Leocal*, 543 U.S. at 9 ("[T]he Court construes language in its context and in light of the terms surrounding it.").

it expected Section 1415(i)(3)(B) to be read broadly to cover these expenses. Indeed, Congress' direction to the GAO would be inexplicable if Congress did not anticipate that the expenses for "consultants" would be recoverable. The GAO certainly understood the statute in that way. Its Report states that "[e]xpert witness fees, costs of tests or evaluations found to be necessary during the case, and court costs for services rendered during administrative and court proceedings are examples of reimbursable expenses" under the Act. U.S. Gen. Accounting Office, *Special Education: The Attorney Fees Provision of Public Law 99-372* 13 (Nov. 1989) (GAO Report).[14]

3. Petitioner also fails to grapple with Section 1415(*l*)

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[14] Congress' use of "consultant" rather than "expert" is readily understood. Congress intended that the phrase "the costs to the parents" reach not only expert costs, but also "expenses" and the costs of tests and evaluations associated with the development of the IEP. Thus, Congress used the term "consultant" to ensure that the GAO also studied the costs to parents of having these tests administered and evaluated and that other services rendered by non-testifying experts were reimbursed. Dictionaries define the terms as synonyms. *See, e.g., Webster's Third New International Dictionary* 490 (1981 ed.). Petitioner contends that because Arons did not testify at the due process hearing, her services would be non-compensable even if the Murphys prevail. Pet. Br. at 30 n.12. This Court denied certiorari on this issue, but petitioner's argument is without merit in any event. Section 4 of the HCPA recognizes that "expenses" and the cost of "consultants" would be reimbursed. The Joint Statement accompanying the HCPA also identifies as compensable expenses expert witness fees, costs of tests and evaluations, and all other litigation costs and expenses reasonably expended by the parents, which plainly includes consultant fees. Finally, courts have routinely reimbursed parents for the costs of non-testifying experts. *See, e.g., Bd. of Educ. v. Summers*, 358 F. Supp. 2d 462, 473 (D. Md. 2005); *Lamoine Sch. Comm. v. Ms. Z*, 353 F. Supp. 2d 18, 44 (D. Me. 2005); *Noyes v. Grossmont Union High Sch. Dist.*, 331 F. Supp. 2d 1233, 1251 (S.D. Cal. 2004); *Turton v. Crisp County Sch. Dist.*, 688 F. Supp. 1535, 1540 (M.D. Ga. 1988).

(Section 3 of the HCPA), which overturned *Smith* by providing that claims under the Constitution and the Civil Rights and Rehabilitation Acts may be joined with claims under IDEA. This provision is significant because, at the time the HCPA was enacted, it was understood that courts could award expert costs in Civil Rights and Rehabilitation Act cases. *See Bradley v. City of Richmond Sch. Bd.*, 416 U.S. 696, 706–710 (1974). Thus, from the vantage point of the Congress that enacted the HCPA, the ordinary usage of the word "costs" would have subsumed the costs of experts.

B. IDEA's Key Substantive Provisions Confirm that Expert Costs May Be Awarded to Prevailing Parents.

The conclusion that expert costs are reimbursable is also in keeping with IDEA's overarching goals: (1) to ensure that children with disabilities receive a "free appropriate public education" and (2) to safeguard the rights of parents to challenge school decisions that adversely affect their child. This Court routinely looks to IDEA's "overall statutory scheme" in interpreting its provisions. *See, e.g., Garret F.*, 526 U.S. at 73; *see generally Koons Buick*, 543 U.S. at 60.

1. IDEA's core goal is to assure that "all children with disabilities have available to them . . . a free appropriate public education." 20 U.S.C. 1400(c). This assurance is deeply ingrained in the Act. *See, e.g., id.* 1400(d)(1)(A), 1412(a)(1)(A), 1415(a); *see also* 1401(8)(A) (defining "free appropriate public education" as one "provided at public expense" and "without charge"); 1401(25) (defining "special education" to mean "specially designed instruction, at no cost to parents"). This Court has faithfully implemented Congress' instruction that an appropriate education be provided to children with disabilities "without charge" and "at no cost to parents." For instance, in

Garret F., 526 U.S. at 73, and *Irving Independent School District v. Tatro*, 468 U.S. 883, 888–91 (1986), the Court invoked IDEA's commitment to a *free* appropriate education in construing the "related services" provision to require schools to provide nursing care to students, notwithstanding the expense. *Id.*

In *Burlington*, the Court relied on IDEA's promise of a "free" appropriate education in interpreting IDEA's grant of equitable authority. 471 U.S. at 368–70. *Burlington* held that this provision empowered courts to require school districts to reimburse parents for the costs of unilateral placements in private schools if the court ultimately determines that such placement was warranted under the Act. *Id.* Then-Justice Rehnquist's opinion for a unanimous Court makes exactly the point that the Murphys make here, emphasizing that it would be "an empty victory" for parents to pay for the placement but "to have a court tell them several years later that they were right but that these expenditures could not in a proper case be reimbursed by the school officials." *Id.* at 370. Such a result would be at odds with "the child's right to a free appropriate public education, the parents' right to participate fully in developing a proper IEP, and all of the procedural safeguards" built into the Act, a result "Congress undoubtedly did not intend." *Id.* at 360, 370; *see also Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 11–14 (1993); *Rowley*, 458 U.S. at 188–92.

The same logic applies here. Apart from attorneys' fees, the most significant expense parents incur in IDEA cases is the retention of an expert and the cost of the tests and evaluations the expert performs. For parents like the Murphys who cannot afford counsel, expert costs are the most significant expense. The availability of experts to enable parents to contest adverse decisions is essential to the fair resolution of due process hearings. If parents like Pearl and Ted Murphy cannot recover

the costs of experts, IDEA's guarantees of both a *free* and *appropriate* public education would be substantially eroded, if not altogether eliminated.

2. IDEA also seeks to enable parents to challenge school decisions that adversely affect their child. *See, e.g.*, 20 U.S.C. 1400(d)(1), 1412, 1414, 1415; *Burlington*, 471 U.S. at 370. Parents in IDEA proceedings are fighting for their child's future. Unlike litigants in other civil rights actions, parents who win IDEA cases generally collect no monetary compensation and there is no recovery that can be used to offset the expenses of an expert. The availability of fees for experts is an indispensable element of IDEA's remedial scheme.

Expert assistance is pivotal to parents in IDEA cases. Due process hearings turn on questions involving the nature and extent of the child's disability and the suitability of the measures the school district proposes to provide the child an appropriate education. *See SRO Decision* at 11–13; *see also Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 850–51 (6th Cir. 2004); *T.R. v. Kingwood Twp. Bd. of Educ.*, 205 F.3d 572, 577–78 (3d Cir. 2000); *Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1216 (3d Cir. 1993). Consider the view of District Judge Pratt, sitting by designation, in his dissent in *Neosho R-V School District v. Clark*, 315 F.3d 1022 (8th Cir. 2003). Judge Pratt noted that schools "employ many education and child experts" and "[a]s one might expect," in due process hearings they "look to their in house experts to testify on behalf of the school district's position." *Id.* at 1036. Parents "who lack the resources to hire an expert witness to evaluate and testify on behalf of their child" are at a serious disadvantage, and the "school district's expert, therefore, goes unchallenged," dooming the child's case. *Id.* To "deny a prevailing parent the right to recover the fees paid to an expert witness forecloses the likelihood that many

underprivileged children will receive the free appropriate public education to which they are entitled." *Id.* at 1036–37.[15]

Because of the resource imbalance, the playing field in IDEA due process hearings tilts decidedly in favor of schools. *Burlington*, 471 U.S. at 368. *Schaffer* holds that, unless a state provides otherwise, parents bear the burden of proof in IDEA hearings challenging the appropriateness of IEPs. 126 S. Ct. at 528. *Schaffer*'s premise is that IDEA hearings are structured to "ensure that the school bears no unique informational advantage." *Id.* at 537. But the problem parents face is not so much an *informational* deficit as an *expert* deficit. School districts have on staff teachers, guidance counselors, psychologists, and other specialists — all of whom qualify as, and may testify as, experts. Parents, in contrast, have to retain experts to challenge school district decisions. *See id.* at 536.

Relying on *Schaffer*, petitioner and the United States suggest that the imbalance in access to experts is addressed by IDEA's requirement that schools provide parents an opportunity for an independent, expert evaluation of their child at public expense. Pet. Br. at 31; *see also* U.S. Br. at 11 n.3. To be sure, *Schaffer* underscores the centrality of expert assistance, noting that it would be unfair to force parents to do battle with school districts "without an expert with the firepower to match the opposition." 126 S. Ct. at 536. But petitioner and the United States go too far in suggesting that IDEA *requires* school districts to supply

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[15] Many district judges share this perspective. *See, e.g., Brillon v. Klein Ind. Sch. Dist.*, 274 F. Supp. 2d 864, 872 (S.D. Tex. 2003), *rev'd on other grounds*, 100 Fed. Appx. 309 (5th Cir. 2004); *Gross v. Perrysburg Exempted Vill. Sch. Dist.*, 306 F. Supp. 2d 726, 739 (N.D. Ohio 2004); *Pazik v. Gateway Reg'l Sch. Dist.*, 130 F. Supp. 2d 217, 221 (D. Mass. 2001); *P.G. v. Brick Twp. Bd. of Educ.*, 124 F. Supp. 2d 251, 267 (D.N.J. 2000).

experts to parents at public expense.

First, independent evaluations and the retention of an expert are different things. Evaluators do not act as experts for parents; they are "independent." Parents do not have free rein in selecting evaluators; the school district generally furnishes the parents with a short list from which they may choose. 34 C.F.R. 300.502(a)(2) (2005). It is not the independent evaluator's job to help parents understand the school's technical evidence, frame questions to challenge the school's experts, or perform the other tasks one expects of a party-retained expert. Nor is there any expectation that the evaluator will testify on the parents' behalf at the due process hearing, let alone a requirement that such testimony would come at public expense.

Moreover, neither IDEA nor the regulations guarantee parents an independent evaluation *at public expense*. IDEA accords parents only the "*opportunity*," not the *right*, to "obtain an independent educational evaluation of the child." 20 U.S.C. 1415(b)(1) (emphasis added). Although the regulations give parents a conditional right to a publicly-funded evaluation if they disagree with the school's evaluation, the regulations also give schools the option to deny parents' request when the school believes that existing evaluations are adequate. 34 C.F.R. 300.502(b)(2)(ii) (2005). Denials force parents into full-scale due process hearings on whether, under the circumstances, an independent evaluation is in fact necessary. *Id.* The volume of litigation over school refusals to pay for independent evaluations suggests that denials are common.[16]

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[16] *See, e.g., Seattle Sch. Dist. No. 1 v. B.S.*, 82 F.3d 1493,1500 (9th Cir. 1996) (school board's refusal to pay for an independent evaluation improper); *Murphysboro Bd. of Educ. v. Ill. State Bd. of Educ.*, 41 F.3d

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Thus, the possibility that parents will obtain a publicly-funded independent evaluation in no way rectifies the expert imbalance Congress has recognized. Rather, the imbalance is addressed in Section 1415(i)(3)(B), which gives parents an assurance that the expert costs they incur in IDEA proceedings will be reimbursed if they prevail.

C. Neither Petitioner Nor the United States Offers a Coherent Reading of Section 1415(i)(3)(B).

The interpretations of Section 1415(i)(3)(B) put forth by petitioner and the United States are irreconcilable with the provision's text. They contend that Section 1415(i)(3)(B) authorizes the "reimbursement of *only* attorneys' fees," and that, to the extent that "costs" are available to prevailing parents, those costs are independently authorized under Sections 1821 and 1920, *not* IDEA. Pet. Br. at 18 (emphasis added); *see also* U.S. Br. at 10–12. That construction is not faithful to the language of Section 1415(i)(3)(B).

1. To start, by contending that Section 1415(i)(3)(B)'s reference to "costs" is *limited* by the phrase "attorneys' fees," petitioner and the United States reverse the provision's actual language, which authorizes an award of attorneys' fees "as *part* of the costs to the parents." The phrase "part of the costs" is not a phrase of *restriction* that limits the provision to expenses lawyers charge in litigating cases. It is instead a phrase of

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1162, 1169 (7th Cir. 1994) (same); *Hudson v. Wilson*, 828 F.2d 1059, 1065 (4th Cir. 1987) (same); *Raymond S. v. Ramirez*, 918 F. Supp. 1280, 1290–91 (N.D. Iowa 1996) (same); *Seals v. Loftis*, 614 F. Supp. 302, 305–06 (E.D. Tenn. 1985) (same); *cf. Ms. M. ex rel. K.M. v. Portland Sch. Comm.*, 360 F. 3d 267, 271 (1st Cir. 2004) (school district did not appeal ruling that it should have paid for an independent evaluation).

inclusion that covers "the costs to the parents," of which attorneys' fees are but one part.

Even worse, their construction takes an eraser to Section 1415(i)(3)(B). They contend that this Court should rewrite Section 1415(i)(3)(B) to say that "the court, in its discretion, may award reasonable attorneys' fees to the parents of a child with a disability who is the prevailing party." That rewriting *deletes* entirely the phrase "*as part of the costs*" from Section 1415(i)(3)(B). It not only renders the phrase surplusage, *see Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 489 n.13 (2004); *Duncan v. Walker*, 533 U.S. 167, 174 (2001), but deleting five words from a provision that has only thirty-eight words is hardly a trivial modification. As this Court has admonished, "parties should not seek to amend [a] statute by appeal to the Judicial Branch." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002).

Finally, petitioner and the United States rest their argument almost exclusively on the fact that there are similarities between the language in Section 1415(i)(3)(B) and Section 1988. But there are significant differences as well, which they overlook. *Casey* rejected the argument that expert fees are part of "attorneys' fees" to parties in Section 1988 district court litigation. That is not the Murphys' argument. The claim here is that the costs of experts are recoverable, not as part of an attorney's fees (indeed, the Murphys proceeded *pro se*), but because expert costs are "part of the costs to parents" in IDEA administrative proceedings. As we explain in Part III, these textual differences underscore that rough similarities in language do not justify reading statutes with different text and different aims as if they were the same.

2. To bolster its interpretation, petitioner argues that the

explicit inclusion of attorneys' fees reflects Congress' deliberate exclusion of expert costs. Pet. Br. at 18. This contention is also refuted by the text of Section 1415(i)(3)(B). The phrase "as *part* of the costs to the parents" makes plain that attorneys' fees are not the *exclusive* "costs" authorized under the Act; to the contrary, it drives home that *additional* costs are authorized as well. Petitioner's argument is indistinguishable from the contention this Court rejected in *Barnhart v. Peabody Coal*: "We do not read the enumeration of one case to exclude another unless it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it." 537 U.S. 149, 168 (2003) (citing *United Dominion Indus., Inc. v. United States*, 532 U.S. 822, 836 (2001)).

3. Both petitioner and the United States claim that Section 1415(i)(3)(F) supports their reading of Section 1415(i)(3)(B). Section 1415(i)(3)(F) permits a court to reduce attorneys' fee awards when parents or lawyers unreasonably protract the controversy, or when lawyers charge unjustifiably high fees. They contend that, had Congress intended to authorize recovery of expert costs, "Congress would [not] have gone to such great lengths in Section 1415(i)(3)(F) to identify the circumstances in which an award of attorneys' fees should be reduced but have remained silent as to expert fees." Pet. Br. at 18 n.6; *see also* U.S. Br. at 11.

Congress had good reason to treat lawyers and experts differently in this regard. Section 1415(i)(3)(F) signals that courts should scrutinize attorneys' fee applications closely to guard against abusive legal tactics and inflated attorneys' fees. H.R. Conf. Rep. No. 99-687, at 6 (1986). Lawyers and parents have considerable power to engage in delay-inducing tactics. Experts do not. Experts do not decide what services they will provide or whether they will testify; lawyers or parents make

those determinations. Moreover, Section 1415(i)(3)(B) confers ample power on the courts to control expert costs, as this case demonstrates. The district court reduced a request for expert costs exceeding $29,000, which it thought was a fair valuation of the services provided, to less than $9,000 to conform with Section 1415(i)(3)(B)'s mandate. Thus, Section 1415(i)(3)(F)'s emphasis on abusive litigation tactics by parents and their lawyers is in no way inconsistent with Congress' decision in Section 1415(i)(3)(B) to authorize awards of expert costs.

4. The evidence contradicts the unsupported claims made by petitioner and the United States that Section 1415(i)(3)(B) must be construed narrowly to avoid imposing a fiscal burden on school districts. Pet. Br. at 30–34; U.S. Br. at 23. Awards of expert costs are generally modest. Many reported cases do not specify the amount of expert costs, but in those that do, the costs range from a few hundred dollars to a few thousand dollars.[17]

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[17] *See, e.g., S. v. Timberlane Reg'l Sch. Dist.*, 2004 U.S. Dist. Lexis 4032, at *25 (D.N.H. 2004) ($825); *Noyes v. Grossmont Union High Sch. Dist.*, 331 F. Supp. 2d 1233, 1251 (S.D. Cal. 2004) ($328.33); *McC. v. Corrigan-Camden Ind. Sch. Dist.*, 909 F. Supp. 1023, 1033 (E.D. Tex. 1995) ($500); *Turton v. Crisp County Sch. Dist.*, 688 F. Supp. 1535, 1540 (M.D. Ga. 1988) ($415.62); *see also R.E. v. N.Y. City Bd. of Educ.*, 2003 U.S. Dist. Lexis 58, at *8–9 (S.D.N.Y. 2003) ($ 2,119.51); *J. v. Bd. of Educ.*, 98 F. Supp. 2d 226, 242–243 (D. Conn. 2000) ($2,622); *P.G. v. Brick Twp. Bd. of Educ.*, 124 F. Supp. 2d 251, 267 (D.N.J. 2000) ($1,207.50); *B. v. Weston Bd. of Educ.*, 34 F. Supp. 2d 777, 784 (D. Conn. 1999) ($3,450); *Poynor v. Cmty. Sch. Dist.*, 1999 U.S. Dist. Lexis 1883, at *5 (N.D. Ill. 1999) ($7,600); *Field v. Haddonfield Bd. of Educ.*, 769 F. Supp. 1313, 1323–24, 1329 (D.N.J. 1991) ($1,801); *Hirsch v. McKenzie*, 1988 WL 78859, at *3 (D.D.C. 1988) ($200). There appear to be only three reported cases in which expert awards exceed $10,000. *See Bd. of Educ. v. Summers*, 358 F. Supp. 2d 462, 472–473 (D. Md. 2005) ($13,974); *B.D. v. DeBuono*, 177 F. Supp. 2d 201, 208–0[illegible] (S.D.N.Y. 2001) ($104,784 in settlement of complex, multi-party pre[illegible]ding); *K.Y.*

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Awards in excess of $10,000 are rare. Shifting expert costs is crucial to parents like the Murphys, for whom a few thousand dollars is a fortune, and could well be decisive to parents in determining whether to run the financial risk of hiring an expert. But there is no evidence that permitting parents to recover expert costs imposes a fiscal burden on school districts.

II. The History Of Section 1415(i)(3)(B) Demonstrates That It Authorizes The Payment Of Expert Costs.

When Congress enacted the HCPA, it understood that Section 1415(i)(3)(B) authorized parents to recover not just their attorney's fees, but the full costs incurred in the due process hearing, including expert costs. That understanding is reflected in the text of Section 1415(i)(3)(B), as well as the HCPA's provision requiring the GAO study and report. It is also reflected in both the implementation history of Section 1415(i)(3)(B) and the drafting history of the HCPA, each of which demonstrates that, at the time Section 1415(i)(3)(B) was enacted, there was no doubt that it authorized the recovery of expert costs.

A. The Implementation History of Section 1415(i)(3)(B) Confirms the Availability of Expert Costs.

Conspicuously omitted from the briefs of petitioner and the

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v. Me. Twp. High Sch. Dist. No. 207, 1999 U.S. Dist. Lexis 2123, at *13 (N.D. Ill. 1999) ($11,190). The modest amounts awarded in expert costs drive home that petitioner's cost-based objections are especially hollow. Had the Murphys had counsel in this matter, which spanned five years, involved multiple administrative proceedings, and resulted in two published Second Circuit opinions, seven district court opinions, and one ruling by a state court, the attorneys' fees would have dwarfed the modest costs awarded by the district court.

United States is any account of Section 1415(i)(3)(B)'s initial implementation. The most reliable sources for interpreting a statute are contemporaneous ones — when recollections are fresh and source materials easy to find — not those nearly twenty years removed. *See Amoco Prod. Co. v. S. Ute Indian Tribe*, 526 U.S. 865, 873–74 (1999); *MCI Telecomms.*, 512 U.S. at 228. Nonetheless, petitioner and the United States ignore all of the pre-2002 sources because, until 2002, the issue had been resolved overwhelmingly in the parents' favor.

To start with, the GAO Report submitted to Congress just three years after the HCPA's passage made explicit that consultant costs, expert witness fees, and the costs of tests or evaluations necessary to the parents' case are reimbursable under the Act. GAO Report at 13. This contemporaneous interpretation of the Act should be accorded deference. *Cf. Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 315 (1933).

The initial judicial constructions of the Act also uniformly favored coverage of expert costs. During the first five years after Section 1415(i)(3)(B) was enacted, *every* court to consider the question concluded that IDEA authorizes the reimbursement of expert fees. Foremost among these decisions was the Third Circuit's 1988 ruling in *Arons*, 842 F.2d at 63. At least six district courts in four different circuits reached the same conclusion.[18]

This Court's 1991 decision in *Casey* had little impact on the

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[18] *See Field*, 769 F. Supp. at 1323–24; *Kattan v. District of Columbia*, 1991 U.S. Dist. Lexis 14543, at *9–10 (D.D.C. 1991), *aff'd*, 995 F.2d 274 (D.C. Cir. 1993); *Doe v. Watertown Sch. Comm.*, 701 F. Supp. 264, 266 (D. Mass. 1988); *Chang v. Bd. of Educ.*, 685 F. Supp. 96, 100 (D.N.J. 1988); *Turton*, 688 F. Supp. at 1540; *Hirsch*, 1988 WL 78859, at *3.

way lower courts viewed Section 1415(i)(3)(B). During the decade following *Casey* (1991–2001), no court of appeals and only a handful of district courts (acting in response to *Casey*) held that expert costs were not recoverable under the statute.[19] On the other hand, during the same time-frame, twenty-nine district judges found expert costs compensable under IDEA.[20] Thus,

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[19] Prior to 2002, only four cases squarely held that Section 1415(i)(3)(B) does not authorize reimbursement of expert fees. *Brandon K. v. New Lenox Sch. Dist.*, 2001 U.S. Dist. Lexis 20006, at *9–12 (N.D. Ill. 2001); *Eirschele v. Craven County Bd. of Educ.*, 7 F. Supp. 2d 655, 659 (E.D.N.C. 1998); *Cynthia K. v. Bd. of Educ.*, 1996 U.S. Dist. Lexis 4054, at *6 (N.D. Ill. 1996); *Jennings v. Duval County Sch. Bd.*, 1992 U.S. Dist. Lexis 20575, at *41–42 (M.D. Fla. 1992). One court said so in *dicta*, *Mayo v. Booker*, 56 F. Supp. 2d 597, 599 (D. Md. 1999), but other courts in the same district have rejected *Mayo*. *See Summers*, 358 F. Supp. 2d at 472–73 (and case cited therein). In *Shanahan v. Bd. of Educ.*, 953 F. Supp. 440, 446 n.9 (N.D.N.Y. 1997), the court denied expert costs on the ground that the plaintiff had failed to submit any "authority for awarding a prevailing party expert fees" under IDEA, even though, at the time, there was contrary case law. *See, e.g.*, *Straube v. Fla. Union Free Sch. Dist.*, 801 F. Supp. 1164, 1182 n.17 (S.D.N.Y. 1992).

[20] **First Circuit**: *Pazik v. Gateway Reg'l Sch. Dist.*, 130 F. Supp. 2d 217, 221–22 (D. Mass. 2001); *Gonzalez v. P.R. Dept. of Educ.*, 1 F. Supp. 2d 111, 116–17 (D.P.R. 1998); *Arunim v. Foxborough Pub. Sch.*, 970 F. Supp. 51, 55 (D. Mass. 1997); *P.S. v. Contoocook Valley Sch. Dist.*, No. 95-154-M, 24 IDELR ¶ 1141 (D.N.H. Sept. 30, 1996); *Fenneman v. Town of Gorham*, 802 F. Supp. 542, 544, 548–49 (D. Me. 1992). **Second Circuit**: *B.D. v. DeBuono*, 177 F. Supp. 2d 201, 208–09 (S.D.N.Y. 2001); *J. v. Bd. of Educ.*, 98 F. Supp. 2d 226, 242–43 (D. Conn. 2000); *P.L. v. Norwalk Bd. of Educ.*, 64 F. Supp. 2d 61, 64 (D. Conn. 1999); *B. v. Weston Bd. of Educ.*, 34 F. Supp. 2d 777, 784 (D. Conn. 1999); *Connors v. Mills*, 34 F. Supp. 2d 795, 808 (N.D.N.Y. 1998); *C.G. v. New Haven Bd. of Educ.*, 988 F. Supp. 60, 68 (D. Conn. 1997); *Straube*, 801 F. Supp. at 1182. **Third Circuit**: *P.G. v. Brick Twp. Bd. of Educ.*, 124 F. Supp. 2d 251, 267 (D.N.J. 2000); *Woodside v. Phila. Bd. of Educ.*, 2000 U.S. Dist. Lexis 568, at *16–17 (E.D. Pa. 2000); *Borough of Palmyra Bd. of Educ.*

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from 1986 until 2001 — ten years after *Casey* and fifteen years after Section 1415(i)(3)(B) was added to IDEA — the Third Circuit and thirty-five district judges concluded that the Act authorized awards of expert costs, while only a handful of district judges saw the matter otherwise.

Even the United States recognized that expert costs are covered by Section 1415(i)(3)(B). In a Federal Register notice published after the 1997 IDEA amendments, the Department of Education modified its attorneys' fees regulation, 34 C.F.R. 300.513, "to make it clear that the prohibition against using Part B funds for attorney's fees also applies to the related costs of a party in an action or proceeding, *such as depositions, expert witnesses, settlements, and other related costs*." 64 Fed. Reg.12,406, 12,615 (Mar. 12, 1999) (emphasis added); *see also* 65 Fed. Reg. 53,808, 53,812 (Sept. 5, 2000).

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v. R.C., No. 97-6199, 31 IDELR ¶ 3 (D.N.J. July 29, 1999); *B.K. v. Toms River Bd. of Educ.*, 998 F. Supp. 462, 474 (D.N.J. 1998); *S.D. v. Manville Bd. of Educ.*, 989 F. Supp. 649, 657 (D.N.J. 1998); *E.M. v. Millville Bd. of Educ.*, 849 F. Supp. 312, 317–318 (D.N.J. 1994). **Fifth Circuit**: *McC. v. Corrigan-Camden Ind. Sch. Dist.*, 909 F. Supp. 1023, 1033 (E.D. Tex. 1995). **Seventh Circuit**: *Koswenda v. Flossmoor Sch. Dist. No. 161*, 227 F. Supp. 2d 979, 996–98 (N.D. Ill. 2002); *Poynor v. Cmty. Unit Sch. Dist. No. 300*, 1999 U.S. Dist. Lexis 18831, at *5 (N.D. Ill. 1999); *K.Y. v. Me. Twp.*, 1999 U.S. Dist. Lexis 2123, at *3 (N.D. Ill. 1999); *Dale M. v. Bd. of Educ.*, 29 F. Supp. 2d 925, 929 (C.D. Ill. 1998), *rev'd on other grounds*, 237 F.3d 813 (7th Cir. 2001); *Hunger v. Leininger*, 1993 U.S. Dist. Lexis 3080, at *24 (N.D. Ill. 1993). **Eighth Circuit**: *Ind. Sch. Dist. No. 283 v. S.D.*, 948 F. Supp. 892, 897 n.4 (D. Minn. 1996). **Ninth Circuit**: *Ash v. Lake Oswego Sch. Dist. No. 7J*, 1992 U.S. Dist. Lexis 5235, at *2–3 (D. Or. 1992), *aff'd*, 980 F.2d 585 (9th Cir. 1992). **D.C. Circuit**: *Calloway v. District of Columbia*, 1999 U.S. Dist. Lexis 13751 (D.D.C. 1999); *Bailey v. District of Columbia*, 839 F. Supp. 888, 892 (D.D.C. 1993); *Aranow v. District of Columbia*, 791 F. Supp. 318, 318 (D.D.C. 1992).

Petitioner and the United States presumably begin their account in 2002 to coincide with the Eighth Circuit's two-to-one decision in *Neosho R-V School District v. Clark*, 315 F. 3d 1022, that *Casey* precludes expert costs under IDEA. Following *Neosho*, the Seventh Circuit in *T.D. v. LaGrange School District*, 349 F.3d 469 (2003), a divided D.C. Circuit in *Goldring v. District of Columbia*, 416 F.3d 70 (2005), and one district court, *Hiram C. v. Manteca Unified School District*, 2004 U.S. Dist. Lexis 29177, at *9–10 (E.D. Cal. 2004), joined the no-expert-costs camp. However, a majority of courts, including the Second Circuit in *Murphy* and nine district courts in the First, Second, Fourth, Fifth, Sixth, and Ninth Circuits, have rejected the reasoning in *Neosho* and held that expert costs are available.[21]

The point here is not that the majority rules. Rather, it is that these decisions belie petitioner and the United States' central claim that Section 1415(i)(3)(B) "unambiguously" excludes the award of expert costs. In *Casey*, the Court closely examined opinions in Civil Rights Act cases "at the time the provision was enacted" and found that they cut against the conclusion that Congress intended that expert costs be recoverable under Section 1988. *See Casey*, 494 U.S. at 94–97 (reviewing cases). Here, the

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[21] *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 402 F.3d 332, 336 (2d Cir. 2005); *Czarniewy v. District of Columbia*, 2005 U.S. Dist. LEXIS 5161, at *15–16 (D.D.C. 2005); *Summers*, 358 F. Supp. 2d at 472–473; *Gross v. Perrysburg Exempted Vill. Sch. Dist.*, 306 F. Supp. 2d 726, 738–739 (N.D. Ohio 2004); *Noyes v. Grossmont Union High Sch. Dist.*, 331 F. Supp. 2d 1233, 1251 (S.D. Cal. 2004); *S. v. Timberlane Reg'l Sch. Dist.*, 2004 U.S. Dist. Lexis 4032, at *22–25 (D.N.H. 2004); *R.E. v. N.Y. City Bd. of Educ.*, 2003 U.S. Dist. Lexis 58, at *8–9 (S.D.N.Y. 2003); *E.R. v. Vineland Bd. of Educ.*, 2003 U.S. Dist. Lexis 26722 (D.N.J. 2003); *Brillon v. Klein Ind. Sch. Dist.*, 274 F. Supp. 2d 864, 870–872 (S.D. Tex. 2003), *rev'd on other grounds*, 100 Fed. Appx. 309 (5th Cir. 2004); *see also Lamoine Sch. Comm. v. Ms. Z*, 353 F. Supp. 2d 18, 44 (D. Me. 2005) (awarding fees to educational consultant).

evidence of contemporary judicial understanding cuts in the opposite direction and is unequivocal; it confirms the Murphys' reading of Section 1415(i)(3)(B). It is implausible to contend, as do petitioner and the United States, that all of these decisions, the GAO, and indeed, the Department of Education, are wrong because the statute "unambiguously" forbids the conclusion they reached.

B. The Drafting History of HCPA Confirms Congress' Intent that Prevailing Parents are Entitled to Recover Expert Costs.

The drafting history of the HCPA reinforces the straightforward, textual reading of Section 1415(i)(3)(B) set forth above. *See Scheidler v. Nat'l Org. for Women*, 126 S. Ct. 1264 (2006); *Exxon Mobil Corp. v. Allapattah Servs.*, 125 S. Ct. 2611, 2625–27 (2005). It demonstrates that at every stage of Congress' deliberations there was a bipartisan consensus in both Houses to authorize prevailing parents to recover their expert costs.

1. Congress enacted the HCPA to respond to *Smith v. Robinson*, 468 U.S. 992 (1984), which held that, in light of the comprehensiveness of IDEA's remedial scheme, it provided an exclusive remedy and, for that reason, parents could not recover attorneys' fees by joining claims under the Civil Rights or Rehabilitation Acts. Justice Brennan's dissent, joined by Justices Marshall and Stevens, urged Congress to revisit the issue. *Id.* at 1030–31.[22]

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[22] Only recovery of "attorneys' fees" under the Civil Rights Act and Section 504 of the Rehabilitation Act were at issue in *Smith*. It did not address whether IDEA's provision for equitable relief, 20 U.S.C. 1415(i)(3)(C)(iii), authorized the reimbursement of expenses parents incur in IDEA proceedings. But this provision is relevant as well, because it reflects Congress' understanding that IDEA empowered courts to make

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Congress did just that. Nineteen days later, identical bills were introduced in both the House and Senate to overturn *Smith*. The bills provided, among other things, that "[i]n any action or proceeding brought under this subsection, the court, in its discretion, may award a reasonable attorney's fee as part of the costs to a parent or legal representative of a handicapped child or youth who is the prevailing party." *See, e.g.*, S. 2895, 98th Cong. 2 (1984). No hearing was held in either House during 1984.

On February 6, 1985, Senator Lowell Weicker introduced a bill, identical to that introduced in 1984, before the 99th Congress. *See* Handicapped Children's Protection Act of 1985, S. 415, 99th Cong. (1985). On March 7, Representative Pat Williams introduced a modified version of the original bill in the House designed to address concerns that were raised the previous year. *See Hearing on H.R. 1523 Before the Subcomm. on Select Education of the H. Comm. on Education and Labor*, 99th Cong. 2–3 (1985) (*House Hearings*). Hearings were then held, and many witnesses emphasized that the fair resolution of IDEA

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prevailing parents whole. As noted above, in *Burlington*, this Court unanimously interpreted IDEA's equitable provision broadly, to require school boards to reimburse parents for their expenditures on unilateral placements ultimately found warranted. IDEA's equitable provision was enacted in the fall of 1975, just a few months after this Court's decision in *Alyeska Pipeline Services Co. v. Wilderness Society*, 421 U.S. 240 (1975), had disapproved the use of non-statutory equitable factors to reimburse attorneys' fees, but before Congress had reacted to *Alyeska* by enacting the Civil Rights Act of 1976. Nothing in *Alyeska* — or *Smith* — spoke to the question of reimbursing expenses for expert assistance, a practice that had been approved by this Court as an element of equitable relief as recently as *Bradley v. City of Richmond School Board*, 416 U.S. 696, 723 (1974). It did not become clear until this Court's decisions in *Crawford* and *Casey* that expert costs were similarly affected.

cases depends on parents having expert assistance.[23] No witness disagreed. Nor did anyone suggest that prevailing parents should not be reimbursed for expert costs.[24]

Following the hearings, a substitute version of the Senate bill was proposed that provided that a court may award "a reasonable attorney's fee, reasonable witness fees, and other reasonable expenses of the civil action, in addition to the costs" to a parent who is the prevailing party. *See* S. Rep. No. 99-112, at 7 (1985) (*Senate Report*); *see also id.* at 4–11. But the substitute also included a provision capping the fees that could be awarded legal services lawyers, which was opposed by House and Senate

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[23] *See, e.g., House Hearings*, at 42 (testimony of Beverly J. Galarza); *id.* at 44 (testimony of Henry W. Christopher); *see also Hearing on S. 415 Before the Subcomm. on the Handicapped of the S. Comm. on Labor and Human Resources*, 99th Cong. 10–11 (1985) (*Senate Hearings*) (testimony of Edward Abrahamson); *id.* at 35 (testimony of Edwin W. Martin); *id.* at 92–93 (statement of the Florida Governor's Commission on Advocacy for Persons with Disabilities); *id.* at 113–14 (additional comment of E. Richard Larson).

[24] The National School Board Association (NSBA) testified and submitted a prepared statement during the House hearings and submitted extensive comments for the record of the Senate Hearing. NSBA made known its concerns about the fiscal impact the amendments might have and about the availability of attorneys' fees for due process hearings, which, in NSBA's view, might make them more adversarial. At no point, however, did the NSBA express concern about permitting prevailing parents to recover expert fees. *See House Hearings*, at 23–28; *Senate Hearings*, at 61–79. This was not an oversight. NSBA's Senate submission expressed concern about authorizing recovery of "the costs of experts during the I.E.P. conference," which is non-adversarial, *id.* at 70, but raised no objection to shifting the costs of experts used during adversarial due process hearings.

Democrats, as well as other controversial provisions. *Id.*[25] These provisions — not expert costs — prompted a bipartisan group of senators, led by Senators Hatch, Weicker, and Dole, but also including Senators Kerry, Kennedy, and Metzenbaum, to propose a streamlined substitute bill, referred to as the Hatch-Weicker substitute. *Id.* at 15–16. Hatch-Weicker provided for discretionary awards of "a reasonable attorney's fee in addition to the costs to a parent" of a child with a disability. 131 Cong. Rec. 21389.

Hatch-Weicker (Amendment No. 561) was accepted on motion by Senator Dole at the outset of the Senate debate. *Id.* Senator Weicker explained that Hatch-Weicker had been "developed in conjunction with and agreed to by the Department of Education and the Department of Justice." *Id.* He characterized the cost and fee provision as consistent with "more [than] 130 fee shifting statutes" already enacted, *id.* at 21390, and then described it as follows:

> S. 415 will enable courts to compensate parents for whatever reasonable costs they had to incur to fully secure what was guaranteed to them by the EHA. As in other fee shifting statutes, it is our intent that such awards will include, at the discretion of the court, reasonable attorney's fees, necessary expert witness fees, and other reasonable expenses which were necessary for parents to vindicate their claim to a free appropriate public education for their handicapped child.

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[25] *See, e.g.*, *Senate Report*, at 17–18 (additional views of Senators Kerry, Kennedy, Pell, Dodd, Simon, Metzenbaum and Matsunaga); 132 Cong. Rec. 17608 (1986) (Rep. Williams).

Id. No Senator questioned this statement, although disputes over other matters were aired. The Senate adopted S. 415 without a recorded vote. *Id.* at 21393.

Proceedings in the House reflect the same commitment to making expert costs available to prevailing parents. Following the House hearings, a substitute version of H.R. 1523 was reported out of committee that authorized courts to "award reasonable attorneys' fees, expenses and costs" to prevailing parents. H.R. Rep. No. 99-296, at 1, 5 (1985) (*House Report*). The House Report explained that "the phrase 'expenses and costs' includes expenses of expert witnesses; the reasonable costs of any study, report, test, or project which is found to be necessary for the preparation of the parents' or guardian's due process hearing, state administrative review or civil action; as well as traditional costs and expenses incurred in the course of litigating a case (e.g., depositions and interrogatories)." *Id.* at 6. There was no objection to this provision, although, like the Senate bill, the House Bill did contain controversial provisions, including one authorizing the recovery of attorneys' fees and costs for administrative proceedings, even in the absence of litigation. *See id.* at 15–17 (supplemental views).

By the time the bill reached the floor, there was bipartisan agreement on a new substitute bill. 131 Cong. Rec. 31369 (1985) (remarks of Rep. Williams). The new bill did not change the cost-shifting provision. But to accommodate concerns about the bill's cost, it did add a provision directing the GAO to study and report to Congress on the legislation's fiscal impact, accompanied by a "sunset" provision. *Id.* at 31370. With the compromise in place, the House passed H.R. 1523 without a recorded vote. *Id.* at 31377. At no point during the House's deliberations on H.R. 1523 was any objection raised to allowing prevailing parents to recoup expert costs.

After the House vote, conferees met to iron out differences between the two bills. The conferees largely accepted S. 415 insofar as it defined parents' rights to recover attorneys' fees and costs, and they accepted H.R. 1523 insofar as it directed the GAO to study the fiscal impact of the legislation and report back to Congress, but without a sunset provision. *See* H.R. Conf. Rep. No. 99-687, at 1–3 (1986) (*Conference Report*). The Joint Statement identified the various issues the Conferees had resolved. Reiterating what the House and Senate had already been told about the provision, the Conferees explained that "the term 'attorneys' fees as part of the costs' include[s] reasonable expenses and fees of expert witnesses and the reasonable costs of any test or evaluation which is found to be necessary for the preparation of the parent or guardian's case in the action or proceeding, as well as traditional costs incurred in the course of litigating a case." *Id.* at 5.[26] The Conference Report and the accompanying Joint Statement were printed together (amounting to seven pages of text) and circulated to all members of Congress in advance of the vote on the final bill; they were also reprinted in the Congressional Record. 132 Cong. Rec. 16701 (1986).[27]

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[26] The Conferees did make one notable change to the wording of what became Section 1415(i)(3)(B). It substituted the phrase "attorneys' fees *as part of* the costs" for "attorney's fees *in addition to* the costs." The Joint Statement explains that "[t]his change incorporates the Supreme Court *Marek v. Chesny* [, 473 U.S. 1 (1985)] decision." *Conference Report*, at 5. *Marek* held that where the underlying statute defines "costs" to include attorneys' fees, attorneys' fees are included in offers of settlement under Rule 68. Although the Conferees' modification of the language had implications for Rule 68 settlement offers, it had no bearing on the meaning of "costs." *Id.*; *see also Marek*, 473 U.S. at 11–12.

[27] Congress does this for a reason. The Joint Statement sets forth the understanding of the Members of Congress who drafted the *final* bill, which reflects compromises on issues dividing the two houses. The Joint

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Both the Senate and House accepted the Conference Report. 132 Cong. Rec. 16823–25 (1986); *id.* at 17607–12. At no point was any objection raised to the Conferees' statement that expert costs would be subject to reimbursement under the Act. The Act was signed into law by President Reagan on August 5, 1986.

2. Despite this clear intent, petitioner claims that "no one suggested that the language Congress enacted — 'attorneys' fees as part of the costs' — encompassed expert fees." Pet. Br. at 24 n.10. That assertion is incorrect: the Joint Statement, signed by the House and Senate Conferees, said just that.

Equally unavailing is petitioner's claim that the legislative history proves "that Congress purposefully declined to include expert costs in attorneys' fees." *Id.* Petitioner points out that the Senate bill initially authorized the award of "witness fees," but the final bill omitted that term. That is true, but does not tell the whole story. As shown above, the "witness fee" language was

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Statement informs Members of Congress of the final bill's contents and how it differs from the bills approved in the House and Senate. After the Conferees issue the Report, it then goes *back* to both chambers, where it is distributed to Members before they vote on whether to accept the Conference Report. Only if both chambers approve the Conference Report is the legislation submitted to the President. The Joint Statement is thus a document of considerable authority. *See* Hon. Robert A. Katzmann, *Courts and Congress* 63–64 (1997) (quoting Judge James L. Buckley as remarking that, as a Senator, "my understanding of most of the legislation I voted on was based entirely on my reading of its language and, where necessary, on explanations contained in the accompanying report"); *see also City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 440 (2002) (citing Conference Report to construe statute); *INS v. St. Cyr*, 533 U.S. 289, 317 (2001) (same); *Rostker v. Goldberg*, 453 U.S. 57, 74 (1981) ("The [Conference] Report, therefore, is considerably more significant than a typical report of a single House, and its findings are in effect findings of the entire Congress.").

part of a controversial bill that was scrapped, in part, because it capped fees for legal services lawyers. It was replaced by the Hatch-Weicker substitute. As Senator Weicker explained when he introduced Hatch-Weicker, the substitute's language was to be construed to cover "attorney's fees, necessary expert witness fees, and other reasonable expenses" necessary for the parents' case. 131 Cong. Rec. at 21389–90(1985).[28]

Nor does the omission of the word "expenses" from the final legislation demonstrate an intent to exclude expert costs, as petitioner contends. The House receded to the Senate's bill in Conference, but did so based on the Joint Statement's explanation that expenses and expert costs are covered by Section 1415(i)(3)(B). *See Conference Report*, at 5. And fundamentally, recovery of "expenses" *is* part of the Act; the GAO was tasked to report on "expenses" recovered by prevailing parents to Congress. Contrary to petitioner's claim, these minor textual changes do not demonstrate that Congress "purposefully declined to include expert costs" in the Act.

Finally, petitioner and the United States contend that the focus of the legislative effort was to restore to parents the right to recover attorneys' fees, not expert costs. Pet. Br. at 24 n.10; U.S. Br. at 19 n.7. That assertion is partially true. It is correct that "attorneys' fees" were the sole item at issue in *Smith*. But to suggest that Congress in the HCPA single-mindedly focused on attorneys' fees is to dramatically understate what Congress sought to achieve in the HCPA, which reflects Congress' full-

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[28] Senator Weicker's reference to 130 similar statutes shows that he was unaware of the variations among these statutes that this Court later relied on in *Casey*. That is not surprising. As noted above, nothing in the record of Congress' deliberations on the HCPA suggests that Senator Weicker or his colleagues had any expectation that the variations in drafting cost-shifting provisions had the significance later given to them in *Casey*.

bore disapproval of *Smith*.[29]

Petitioner and the United States fixate on what the HCPA purportedly did *not* do. But what is striking about their discussion of the history of the HCPA is how little they say about what Congress *did* do in the Act. In the course of shaping the HCPA, Congress resolved many contentious issues. But there was not one objection to authorizing prevailing parents to recover expert costs. Nor was there any reason, given the then-prevailing understanding about the meaning of the word "costs," to conclude that Congress had anything else in mind. All of the indicia of congressional intent — the full text of the HCPA, its purpose and the purpose of IDEA, and the resolve of the leaders of both parties to support the Hatch-Weicker substitute — support the conclusion that Congress authorized the recovery of expert costs.

III. *Crawford Fitting* And *Casey* Do Not Call For A Different Reading Of The Act.

Every case holding that IDEA does not permit awards of expert costs has relied on *Casey* to conclude that "costs" has a legal, term-of-art meaning that excludes expert fees. This reliance is misplaced. Neither *Crawford Fitting* nor *Casey* sheds light on what Congress meant in 1986 when it enacted the HCPA.

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[29] Congress accomplished many goals in the HCPA: Section 2, codified at 20 U.S.C. 1415(i)(3)(B), provided the authorization for the award of "attorneys' fees" found lacking in *Smith*; Section 3, codified at 1415(*l*), overturned *Smith*'s basic holding by providing that claims under the Civil Rights and Rehabilitation Acts may be maintained with IDEA claims; Section 4 directed the GAO Report; and Section 5 made Section 1415(i)(3)(B) retroactive to all cases brought or pending after July 4, 1984 (the day before *Smith* was decided).

To understand why these decisions do not inform the interpretation of IDEA, it is useful to review their specific holdings. In *Crawford Fitting*, the Court held that the expenses of hiring an expert could not be assessed against a losing party as part of "costs" in federal court proceedings governed by 28 U.S.C. 1821 and 1920. "[A]bsent explicit statutory or contractual authorization for the taxation of the expenses of a litigant's witnesses as costs, federal courts are bound by the limitations set out in 28 U.S.C. § 1821 and § 1920," which do not authorize the shifting of expert costs. 482 U.S. at 445. Building on *Crawford Fitting*, *Casey* held that Section 1988's authorization for awards of "attorneys' fees" did not extend to expert fees. 499 U.S. at 96–97. The Court supported its conclusion by first pointing to 28 U.S.C. 1821(b) and 1920(c) — which fix compensation for witnesses (not just experts) in federal court proceedings — and held that there was no indication that Congress repealed these provisions by implication when it enacted Section 1988. *Id.* at 87–88. *Casey* also observed that Congress, in thirty-four other cost-shifting statutes, explicitly provided authorization to reimburse expert witnesses. In the absence of evidence to the contrary, it was fair to conclude that Congress had not intended Section 1988's authorization to award attorneys' fees as encompassing expert fees. *Id.* at 88–94.[30]

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[30] The Civil Rights Act of 1991 expressly authorized awards of expert fees in Section 1988. P.L. 102-166, 105 Stat. 1071, 1099 (1991), codified at 42 U.S.C. 1988(c). Congress did not revisit IDEA in that enactment. At that time, there was no need to: No court had ruled, or even suggested, that IDEA did not provide authorization for expert costs. Nor did Congress revisit the issue when IDEA was reauthorized in 1997 or 2004. Both petitioner and the United States point to proposed legislation in 2004 that would have amended IDEA and many other statutes to provide explicit authorization for expert fees awards. Pet. Br. at 22 n.8; U.S. Br. at 22–23 n.8. But as this Court emphasized earlier this Term, "[f]ailed legislative proposals are a 'particularly dangerous

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In *Casey*, the Court distinguished IDEA from Section 1988 by pointing to the Joint Statement's explanation that expert costs would be reimbursable. The Court remarked: "The specification [in the Joint Statement] would have been quite unnecessary if the ordinary meaning of the term included those elements. The statement is an apparent effort to *depart* from ordinary meaning and to define a term of art." 499 U.S. at 91 n.5 (emphasis in original). Courts have disputed the meaning of this footnote. *Compare, e.g.*, *Murphy*, Pet. App. at 10a–11a, *with Goldring*, 416 F.3d at 75. But one thing is clear: *Casey* avoided pre-judging the issue in this case. And for good reason. There are many factors that differentiate this case from *Casey*, beyond the most obvious one — that IDEA is a very different statute than Section 1988, and the language of IDEA has to be examined in the context of *that* statute. *Leocal*, 543 U.S. at 8–10.

1. First and foremost, the text of Section 1415(i)(3)(B), coupled with Congress' direction to the GAO to study and report back on the costs of expenses and consultants in IDEA cases, leave no doubt that Section 1415(i)(3)(B) authorizes courts to reimburse expert costs to prevailing parents. Statutory language must be construed in light of the historical context facing the Congress that enacted it; not through the lens of hindsight, post-enactment developments, or the language of other, unrelated statutes. *MCI Telecomms.*, 512 U.S. at 228. Nothing in the HCPA's history suggests that Congress anticipated the legal, term-of-art meaning that *Crawford Fitting* and *Casey* ascribed to the word "costs," and there is much to refute it. At every turn,

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ground on which to rest an interpretation of a prior statute.'" *Lockhart v. United States*, 126 S. Ct. 699, 702 (2005) (quoting *United States v. Craft*, 535 U.S. 274, 287 (2002) and *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990)).

Congress expressed its understanding that courts would construe the cost-shifting language in the Act to authorize awards of expert costs, not to preclude such awards. In so doing, Congress made it clear that "costs" should be read in its ordinary sense, not as a term of art. To the extent that *Crawford* and *Casey* demand clarity on Congress' part, that test is amply met here.

2. The text and purposes of IDEA and Section 1988 are quite different, which also suggests that *Casey* has no bearing here. There are key textual differences between the two provisions that reflect their different aims. Section 1415(i)(3)(B) speaks of "the costs to the *parents*." Section 1988 authorizes costs to "the prevailing *party*." This difference reflects Congress' intent in IDEA to authorize the reimbursement of costs parents incur mainly in challenging adverse school board determinations *in state administrative proceedings*,[31] whereas Section 1988 was aimed at permitting prevailing civil rights plaintiffs to recover their litigation costs *in federal court*. Section 1988 does not ordinarily authorize awards of costs incurred in state administrative proceedings. *See, e.g., N.C. Dep't of Transp. v. Crest St. Cmty. Council, Inc.*, 479 U.S. 6 (1986); *Webb v. Dyer County Bd. of Educ.*, 471 U.S. 234 (1985). Because the aims of Section 1415(i)(3)(B) are so different, petitioner's effort uncritically to engraft *Casey*'s understanding about the meaning of "attorneys' fees" in Section 1988 onto the authorization for "the costs to the parents" in Section 1415(i)(3)(B) is unavailing. Rough similarities in statutory language cannot be invoked as a means of subverting stark differences in congressional intent.

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[31] Every circuit recognizes that parents may bring an action under IDEA *solely* to recover fees and costs incurred in state administrative proceedings. *See, e.g., Eggers v. Bullitt County Sch. Dist.*, 854 F.2d 892, 895–898 (6th Cir.1988); *Brown v. Griggsville Cmty. Unit Sch. Dist. No. Four*, 12 F.3d 681, 683–85 (7th Cir. 1993); *Moore v. District of Columbia*, 907 F.2d 165, 169–172 (D.C. Cir. 1990) (en banc).

Moreover, *Casey* rested in part on the proposition that permitting expert fees to be awarded in litigation under Section 1988 as part of attorneys' fees would work an implied repeal of 28 U.S.C. 1821(b) and 1920. *Casey*, 499 U.S. at 87–88. But those provisions, by their express terms, apply only to proceedings in *federal* court. As noted, IDEA proceedings are different from the civil rights cases covered by Section 1988, because the record in IDEA cases is compiled during state due process hearings where Sections 1821(b) and 1920 have no applicability. Thus, *Casey*'s implied repeal theory has no bearing on IDEA.[32]

3. *Casey* also based its ruling on a determination that, at the time Congress enacted Section 1988, cost-shifting provisions authorizing the award of "attorney's fees as part of the costs" had

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[32] The majority opinions in *Goldring* and *Neosho* suggest that courts in IDEA cases could award costs and witness fees for state due process hearings under Sections 1821(b) and 1920. *See Goldring*, 416 F.3d at 77 n.4; *Neosho R-V Sch. Dist.*, 315 F.3d at 1031–32. Both opinions disregard the text of those provisions, which apply only to proceedings in federal court. 28 U.S.C. 1821(a)(2) (defining "court of the United States" for the purpose of witness fees to include only federal and not state courts); 28 U.S.C. 1920 (permitting only a Judge or clerk of a federal court to tax costs); 28 U.S.C. 451 (defining court of the United States); *see also Neosho R-V Sch. Dist.*, 315 F.3d at 1034 (Pratt, J., dissenting) (criticizing majority opinion on this ground). *Goldring* and *Neosho* also overlook another consequence of their holdings: Congress provided that IDEA cases could be brought in state as well as federal court, 20 U.S.C. 1415(i)(A)(2), and it is by no means clear that Sections 1821 and 1920 authorize an award of costs in *state* courts. Under petitioner's argument and the holdings in *Goldring* and *Neosho*, the authorization for "costs" in IDEA has no independent meaning. That interpretation leaves parents in state court IDEA cases potentially worse off than their federal counterparts, who are at least entitled to the costs authorized under Sections 1821 and 1920, while state court plaintiffs may be left only whatever costs, if any, are authorized under state law.

"a clearly accepted meaning in legislative and judicial practice" that *excluded* awards of expert costs. 499 U.S. at 88–94. Here, the "legislative and judicial practice" cuts in the opposite direction. All of the relevant legislative material confirm that Congress understood the term costs to *include* expert costs, including the House Report, Senator Weicker's floor statement, the Joint Statement, the GAO reporting requirement, and the GAO's Report. Even the Department of Education held that view. The same is true of the "judicial practice" following the HCPA's passage. Courts uniformly understood the HCPA to confer authority to award the costs of experts. *See supra* at II.A.

4. More generally, the Congress that enacted the HCPA had every reason to think that courts would respect its intentions as made plain in the legislative history. The HCPA was enacted in response to *Smith v. Robinson*, which relied heavily on legislative history to conclude that Congress intended IDEA to provide a comprehensive remedial scheme. 468 U.S. at 1010–11. Chief Justice Burger's opinion for the Court in *Tatro* (issued on the same day as *Smith*) relied on IDEA's legislative history in construing the scope of the Act's exclusion of "medical services." *Tatro*, 468 U.S. at 893; *see also Rowley*, 458 U.S. at 192–98 (reviewing legislative history to determine what is an "appropriate" education). Thus, for the Congress that enacted the HCPA, the notion that a reviewing court would shut its eyes to the Joint Statement and other uncontroverted expressions of intent in the legislative history to resolve any possible doubt about the statute's meaning would have been alien.

5. Finally, the interpretative task in *Casey* was different from the one here because Section 1988 is a stand-alone cost-shifting provision that applies to many civil rights statutes. Thus, in construing Section 1988, *Casey* could not follow the Court's general practice of looking to related textual provisions to shed

light on Section 1988's meaning, but instead found it necessary to look at other statutes, enacted by other Congresses. That is not true here. As noted above, when Section 1415(i)(3)(B) is examined in the context of related provisions in both the HCPA and IDEA, Congress' intent is clear.

IV. Spending Clause Considerations Do Not Affect The Interpretation Of Section 1415(i)(3)(B).

Petitioner and the United States argue that Section 1415(i)(3)(B) should be construed to exclude expert costs under rules of interpretation applicable to Spending Clause legislation. Pet. Br. at 19–20; U.S. Br. at 13. Section 1415(i)(3)(B) has been the law for twenty years, but they cite no case involving expert costs in which a Spending Clause argument was made, let alone accepted. Nor did petitioner make a Spending Clause argument in the lower courts.[33] There is good reason why this argument was not raised before — it is wrong and it is beside the point.

It is wrong because the HCPA was enacted under Section 5 of the Fourteenth Amendment.[34] It is wholly inaccurate to say, as

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[33] Petitioner has therefore forfeited this argument. *See, e.g., TRW, Inc. v. Andrews*, 534 U.S. 19, 34 (2001) (declining to reach question "not raised or briefed below").

[34] The HCPA made the Act's cost-shifting provision retroactive to cases pending at the time this Court decided *Smith*. In litigation over the retroactivity provision's constitutionality, the courts uniformly rejected Spending Clause claims because the HCPA provided ample notice to states and because it was enacted pursuant to Congress' authority under Section 5 of the Fourteenth Amendment, *see, e.g., Fontenot v. La. Bd. of Elementary & Secondary Educ.*, 835 F.2d 117 (5th Cir. 1988), or pursuant to Congress' power under Section 5 *and* the Spending Clause. *See, e.g., Mitten v. Muscogee County Sch. Dist.*, 877 F.2d 932 (11th Cir. 1989); (continued...)

does petitioner, that IDEA is *exclusively* a Spending Clause statute. IDEA was enacted under Section 5 as well. *See* 20 U.S.C. 1400(c)(6) (Congress enacted IDEA "to assure equal protection of the law"). This Court has never held that Spending Clause principles cabin the interpretation of IDEA, and such a ruling would be at odds with many of the Court's prior IDEA cases. *See, e.g.*, *Burlington*, 471 U.S. at 369; *Smith*, 468 U.S. at 1010–11; *Rowley*, 458 U.S. at 180, 192–200.

More fundamentally, the argument is beside the point. The Spending Clause requires Congress to give states fair notice of their fiscal obligations when they accept federal funds. *See, e.g.*, *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998). The HCPA did just that. In the years following the HCPA's enactment, courts overwhelmingly interpreted Section 1415(i)(3)(B) as imposing an obligation on school boards to pay parents their costs, including the costs of experts, when they prevailed. No school district objected to the award of expert costs on Spending Clause grounds. Nor did petitioner Arlington Central. The question here is not the adequacy of notice. The question is whether now, twenty years after passage of the HCPA, there is reason to question the judgment of the vast majority of courts, the GAO, and even the United States, all of whom concluded that Section 1415(i)(3)(B) authorizes courts to award the costs of experts to prevailing parents. There is none.

(...continued)
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CONCLUSION

For the reasons stated above, the judgment below should be affirmed.

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No. 05-18

IN THE

Supreme Court of the United States

ARLINGTON CENTRAL SCHOOL DISTRICT
BOARD OF EDUCATION,

Petitioner,

v.

PEARL MURPHY and THEODORE MURPHY,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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ARGUMENT

I. The Second Circuit erred in holding that the Individuals with Disabilities Education Act ("IDEA")'s attorneys' fees shifting provision authorizes a court to award expert fees to the parents of a child with a disability who is a prevailing party.

A. The IDEA contains no explicit statutory authority for the recovery of expert fees.

Respondents acknowledge that statutory language is the starting point in any case of statutory construction (Res. Br. at 17).[1] The IDEA grants district courts of the United States discretionary authority to "award reasonable attorneys' fees as part of the costs to the parents of a child with a disability who is the prevailing party." *See* 20 U.S.C. § 1415(i)(3)(B).[2]

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1. Conversely, Amicus Council of Parent Attorneys and Advocates ("COPAA") incorrectly suggest that "the Court must first inquire whether . . . an award [of expert fees] is necessary" (Amicus Br. at 4). *Cf. Leocal v. Ashcroft*, 543 U.S. 1, 8 (2004).

2. The IDEA was originally entitled the "Education of the Handicapped Act" (the "EHA") and was originally enacted as Title VI of the Elementary, Secondary, and Other Education Amendments of 1969. *See* Pub. L. No. 91-230, 84 Stat. 175. In 1975, certain amendments were enacted in the "Education for All Handicapped Children Act" (the "EAHCA"). *See* Pub. L. No. 94-142, 89 Stat. 773. Its name was changed to IDEA in 1990 by Pub. L. No. 101-476, 104 Stat. 1142. Congress entirely revised the IDEA in 1997. *See* Pub. L. No. 105-17, 111 Stat. 88. The IDEA was recently amended by the Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA"), Pub. L. No. 108-446, 118 Stat. 2647 (Dec. 3, 2004), which took effect on July 1, 2005. Because all events related to this case occurred prior to the IDEIA's effective date, all statutory citations refer to the IDEA, as codified prior to the enactment of the IDEIA. *See Lillbask v. State of Conn. Dep't of Educ.*, 397 F.3d 77, 80 n.1 (2d Cir. 2005).

Respondents concede that expert fees are not part of attorneys' fees – "That is not the Murphy's argument" (Res. Br. at 26).[3] Respondents argue instead that expert fees are inherently recoverable as costs.

This Court has previously rejected the suggestion that expert fees might be part of the costs allowable in a fee-shifting statute. *See Casey*, 499 U.S. at 87 n.3. There is "no authority to support the counter-intuitive assertion that the term 'costs' has a different and broader meaning in fee-shifting statutes than it has in the cost statutes that apply to ordinary litigation."[4] *See id.* Indeed,

> The specification [in House Conference Report No. 99-687 that the 'term 'attorneys' fees as part of the costs' include reasonable expenses and fees of expert witnesses and the reasonable costs of any test or evaluation which is found to be necessary for the preparation of the . . . case'] would have been quite unnecessary if the ordinary meaning of the term included those elements.

See id. at 91 n.5. The Second Circuit likewise acknowledged in its opinion below that "'costs' . . . generally does not

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3. Respondents acknowledge that this Court's decision in *West Virginia Univ. Hosp., Inc. v. Casey*, 499 U.S. 83 (1991) "rejected the argument that expert fees are part of 'attorneys' fees' to parties in Section 1988 district court litigation" (Res. Br. at 26).

4. Even Respondents' Amici, National Disability Rights Network and the Center for Law and Education ("NDRN-CLE"), concede that "absent congressional action, the range of costs ordinarily recoverable to a party prevailing in federal court are limited to those enumerated at 28 U.S.C. §§ 1920 and 1821(b)" (Amici Br. at 15).

include expert fees in civil rights fee-shifting statutes" (Pet. App. A at 8a).[5]

Contrary to the respondents' assertion, the application of Sections 1821 and 1920 of Title 28 of the United States Code to IDEA claims will not deprive parents of the opportunity to recover taxable costs for due process proceedings (*cf.* Res. Br. 16, 46). While only courts, not administrative hearing officers, are authorized to award fees, the award can be the result of either an administrative decision or court case. *See Lucht v. Molalla River Sch. Dist.*, 224 F.3d 1023, 1028 (9th Cir. 2000); *Megan C. v. Indep. Sch. Dist. No. 625*, 57 F. Supp. 2d 776, 783 (D. Minn. 1999). The respondents also concede that "every circuit recognizes that parents may bring an action under IDEA solely to recover fees and costs incurred in state administrative proceedings" (Res. Br. at 45 n.31).

Alternatively, respondents argue that recovery of experts' fees is part of the Act, as the GAO was tasked to report on "expenses" recovered by prevailing parents to Congress. *See* Handicapped Children's Protection Act of 1986 ("HCPA") § 4(b)(3), Pub. L. No. 99-372, 100 Stat. 796 (1986). Respondents attach great weight to the fact that the

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5. There would be a similar result if the respondents had made their claim in state court. While a party to whom costs are awarded is entitled to recover "reasonable and necessary expenses as are taxable according to the course and practice of the court, by express provision of law or by order of the court," N.Y. C.P.L.R. § 8301(a)(12) (McKinney 1981), it is well established that only statutory witness fees may be taxed, *see County of Sullivan v. Emden*, 59 A.D.2d 957, 958, 400 N.Y.S.2d 376, 378 (3d Dep't 1977). "Expert witness fees are not recoverable under the discretionary provision of CPLR 8301(a)(12) absent extraordinary circumstances." *Board of Educ. of Northport-East Northport Union Free Sch. Dist. v. Ambach*, 90 A.D.2d 227, 242, 458 N.Y.S.2d 680, 690 (3d Dep't 1982).

GAO read "expenses" *en passant* as including "expert witness fees."[6]

As a preliminary matter, the Second Circuit did not cite the GAO report as probative, or even relevant, to its analysis of the IDEA's attorneys' fees provision (Pet. App. A at 8a). The Second Circuit likely decided against grounding its opinion on the word "expenses" in Congress' charge to the GAO because this Court has previously dismissed speculation that the disbursements by attorneys are "costs" within the meaning of the statute. *See Casey*, 499 U.S. at 87 n.3; *see also United States Football League v. National Football League*, 887 F.2d 408, 416 (2d Cir. 1989) ("attorney's fees awards include those reasonable out-of-pocket expenses incurred by attorneys and ordinarily charged to their clients.").

The directive to the GAO lacks any mention of recovery of experts' fees under the HCPA, which under Section 4(b)(3)(A) references the "specific amount of attorneys' fees, costs, and expenses awarded" and under Section 4(b)(3)(B) references the "hours spent by personnel, including attorneys and consultants, involved in the action or proceeding, and expenses incurred by parents and the State educational agency

6. The GAO Report states, in relevant part:

> Expert witness fees, costs of tests or evaluations found to be necessary during the case, and court costs for services rendered during administrative and court proceedings are examples of reimbursable expenses.

Government Accounting Office, *Special Education: The Attorney Fees Provision of Public Law 99-372* (HRD-90-22BR) at 13 (Nov. 1989). The GAO exists to serve Congress and its committees, so it is no surprise that the GAO Report mirrors language contained in the House Conference Committee Report. *Compare id. with* H.R. Rep. No. 99-296 (99th Cong. 1st Sess.) at 5 (Oct. 2, 1985), *reprinted in* 1986 U.S.C.C.A.N. 1798, 1808.

and local educational agency." Here, the word "expenses" likely meant "disbursements (billed directly to the client)." *See Casey*, 499 U.S. at 87 n.3 (*citing Northcross v. Board of Educ. of Memphis Schs.*, 611 F.2d 624, 639 (6th Cir. 1979) ("reasonable out-of-pocket expenses incurred by the attorney" included in Section 1988 "attorney's fee" award), *cert. denied*, 447 U.S. 911 (1980)).[7] Since Congress directed the GAO to study expenses of both the parents and school districts, it is more likely that these are requests for data on which to base future legislation. This construction is strengthened by the lack of response by the GAO, despite repeated meetings with Congress.[8]

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7. For similar reasons, respondents' reliance on Congress' directive to the GAO to obtain data on "the number of hours spent by personnel, including attorneys and *consultants*, involved in the action or proceeding," HCPA, Pub. L. No. 99-372, § 4(b)(3), 100 Stat. 796, 797-798 (1996), is equally unavailing, as the GAO's Report included no information on expert *fees* in response to the separate charge to study consultant *hours*, *see* GAO, *Special Education: The Attorneys Fees Provision of Public Law 99-372* (HRD-90-22BR) (Nov. 1989).

Respondents' Amici, NDRN-CLE, in turn, suggest that if the charge to the GAO does not provide explicit statutory authority for the recovery of expert fees, it at least creates the necessary statutory ambiguity to trigger a review of the IDEA's legislative history (Amici Br. at 17 n.20). Lacking any direction to review "expert fees" there is no ambiguity, but the purpose for the direction is resolved by reviewing the report the GAO prepared for Congress after three separate meetings with Congress. *See id.* at 2, 15. Congress instructed the GAO "to obtain available information on the total amount of attorney fees paid by state or local educational agencies to parents of handicapped children under the act during fiscal years 1987 and 1988." *See id.* at 2. And that is what the GAO did.

8. In its 85 page report, the GAO references "expert witness fees" only once – no data on "expert witness fees" is reported or

(Cont'd)

Respondents and Amicus COPAA misinterpret a Federal Register notice published after the 1997 IDEA Amendments (Res. Br. at 33; Amicus Br. at 3). This notice did not recognize that expert fees are recoverable as costs under Section 1415(i)(3)(B), or even address that issue. *See* 64 Fed. Reg. 12,406, 12,615 (Mar. 12, 1999); *see also* 34 C.F.R. § 300.513(b). Instead, the notice clarified the prohibition against using Part B funds for the litigation expenses of either parents or school districts. *See id.*

1. The IDEA provides no notice to either school districts or parents of the availability of expert fees.

The concept of notice is fundamental to the IDEA. *See* 20 U.S.C. § 1415(b)(3) (school districts required to give parents written notice of their rights at key intervals in the IEP development process); 20 U.S.C. § 1415(d)(1) (same); 20 U.S.C. § 1415(c) (defining the content of prior written notice before school district action); 20 U.S.C. § 1415(d)(2)

(Cont'd)

analyzed anywhere in the report. *See* GAO, *Special Education: The Attorneys Fees Provision of Public Law 99-372* (HRD-90-22BR) (Nov. 1989). The GAO had discussions with the offices of Senators Kennedy and Harkin and Congressmen Hawkins and Owens prior to the study to set its parameters. *Id.* at 1. The GAO provided an interim briefing to the staffs of the House Education and Labor Committee and Senate Labor and Human Resources committee in March 1988. *Id.* at 2, 15. The GAO also provided a final briefing to the staffs from the same committees on September 22, 1989, prior to the report's publication in November 1989. GAO, *Special Education: The Attorneys Fees Provision of Public Law 99-372* (HRD-90-22BR) at 2, 15 (Nov. 1989). Data on expert fees is likewise omitted from the GAO's study in September 2003 of dispute resolution under the IDEA. *See* GAO, *Special Education – Numbers of Formal Disputes Are Generally Low and States Are Using Mediation and Other Strategies to Resolve Conflicts* (GAO-03-897) at 7 (Sept. 2003).

(notice of the parents' rights must be written in an "easily understandable manner"); *Weast v. Schaffer*, 377 F.3d 449, 454 (4th Cir. 2004), *aff'd*, 546 U.S. __, 126 S. Ct. 528 (2005) ("By the time the IEP is finally developed, parents have been provided with substantial information about their child's educational situation and prospects."). Yet, of all the notice that the IDEA requires school districts to give parents, they are not required to give parents notice of the recovery of expert fees. *Cf.* 20 U.S.C. § 1415(d)(2) (defining the content of the written procedural safeguard notice provided parents); 34 C.F.R. § 300.504(b) (same); *see also* Rebecca H. Cort, *Revised New York State Procedural Safeguards Notice: Rights for Parents of Children with Disabilities, Ages 3-21* (NYSED July 2005).

If the IDEA does not require school districts to notify parents of the availability of expert fees, *see id.*, as it does of the availability of attorneys' fees, *see* 20 U.S.C. § 1415(d)(2)(M); 34 C.F.R. § 300.504(b)(13), then it is incorrect to assume that either parents or school districts are on notice from the statute of the recovery of expert fees to prevailing parents in actions or proceedings brought under the Act. Having required school districts to notify parents of their important rights under the law, the absence of notice of a right to experts' fees is a telling omission, indicating that those fees, whatever they might be, are not shifted to the school districts if the parents prevail.

This absence of notice of the recovery of expert fees, *cf.* 20 U.S.C. § 1415(d)(2), also belies the alleged importance respondents and Amici NDRN-CLE attribute to congressional intent to include experts' fees in the careful balance Congress struck in making "enforceable the rights of . . . children while at the same time endeavoring to relieve the financial burden imposed on the agencies responsible to guarantee those rights," *Smith v. Robinson*, 468 U.S. 992, 1021 (1984).

B. The Second Circuit erred in relying on legislative history to construe the IDEA as providing for the recovery of expert fees.

The conflicting legislative history presented by the parties on the scope of the IDEA's attorneys' fees provision demonstrates why it is a basic principle of statutory interpretation that a court should not consider the legislative history of a statute unless the plain language of the statute is ambiguous. *See, e.g., Burlington Northern R.R., Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987). While the Second Circuit may consider a conference committee report to be more reliable than other forms of legislative history (Joint App. A at 11a), "a sentence in a conference report cannot rewrite unambiguous statutory text with a Supreme Court tested and approved meaning." *Goldring v. District of Columbia*, 416 F.3d 70, 75 (D.C. Cir. 2005); *see also Department of State v. Washington Post Co.*, 456 U.S. 595, 600 (1982) ("Passing references and isolated phrases are not controlling when analyzing a legislative history."). "The best evidence of that purpose is the statutory text adopted by both Houses of Congress and submitted to the President." *Casey*, 499 U.S. at 98. "Where that contains a phrase that is unambiguous – that has a clearly accepted meaning in both legislative and judicial practice – we do not permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process." *Id.* "Congress could have made explicit in the statutory language of the IDEA that attorneys' fees include expert fees," *Goldring v. District of Columbia*, No. 02 Civ. 1761, slip op. at 6 (D.D.C. July 21, 2004), *aff'd*, 416 F.3d 70 (D.C. Cir. 2005), "yet, the fee shifting statute at issue here provides no explicit authorization of expert witness fees," *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, 1032 (8th Cir. 2003).

Alternatively, respondents urge this Court to consult "signals" (Res. Br. at 18) from the HCPA's "drafting history" (Res. Br. at 34) to illuminate Congress' "understanding" (Res. Br. at 47) that the term "costs" in the IDEA includes expert costs. In 1986 Congress inserted a provision in the Act to expressly allow an award of reasonable attorneys' fees as part of the costs to the parents of a child with a disability who is the prevailing party. This provision was added in 1986 in response to this Court's decision in *Smith v. Robinson*, 468 U.S. 992 (1984). In that case this Court held that plaintiffs who prevail in an EHA action were not entitled to an award of attorneys' fees under any other federal statute, based on the fact that the EHA contained no express provision for an award of attorneys' fees. *See Smith*, 468 U.S. at 1015. In enacting the HCPA, Congress specifically added the attorneys' fees provisions (then contained in Section 1415(e)(4)), lifting Section 1988's language allowing attorneys' fees to be shifted to a prevailing party, and provided that this and other HCPA provisions affecting the award of attorneys' fees were to be given retroactive effect.

Although Congress entirely revised the IDEA in 1997, *see* Pub. L. No. 105-17, 111 Stat. 88, and reclassified the attorneys' fees provision under a different subsection of Section 1415 (from Section 1415(e)(4)(B) to Section 1415(i)(3)(B)), it reenacted substantially the same language regarding the award of attorneys' fees, *see Jason D.W. v. Houston Indep. Sch. Dist.*, 158 F.3d 205 (5th Cir. 1998). Congress stated that it intended the 1997 amendments to the IDEA's attorneys' fees provision, like former Section 1415(e)(4), to be interpreted in accordance with principles set forth in this Court's opinion in *Hensley v. Eckerhart*, 461 U.S. 424 (1983) on the relationship between the extent of success and the amount of the fee awarded in federal civil rights cases, *see* H.R. Rep. No. 105-95, at 106, *reprinted in* 1997 U.S.C.C.A.N. 104; H.R. Conf. Rep. No. 687, at 5, *reprinted in* 1986 U.S.C. Appx. §§ 1798, 1808. This Court's

opinion in *Hensley* did not endorse the recovery of a prevailing party's expert fees, but instead was focused on whether a partially prevailing plaintiff may recover an attorney's fee for legal services on unsuccessful claims. *See Hensley*, 461 U.S. at 426.

In 2004 Congress considered, but did not adopt, a bill (the Fairness and Individual Rights Necessary to Ensure a Stronger Society: Civil Rights Act of 2004) that would have amended IDEA and numerous other civil rights statutes to explicitly authorize an award of expert fees. *See* S. 2088, 108th Cong. 2d Sess. (2004); H.R. 3809, 108th Cong. 2d Sess. (2004). The bill explained that its purpose was, *inter alia*, "to allow recovery of expert fees by prevailing parties under civil rights fee-shifting statutes" and that this purpose was "made necessary by the decision of the Supreme Court in [*Casey*]." *See* S. 2088 at §§ 521, 522(1). Specifically, it would have provided that "Section 615(i)(3)(B) of the Individuals with Disabilities Education Act (20 U.S.C. § 1415(i)(3)(B)) is amended by inserting '(including expert fees)' after 'attorneys' fees.' " S. 2088 at § 523(c). If, as the Second Circuit posited below, Congress already allowed for the recovery of expert fees under IDEA's fee-shifting provision, then Congress would have had no need to include IDEA among the civil rights statutes to be amended by the bill. That bill expired at the end of the 108th Congress.

C. *Casey* does not authorize a departure from the language of the statute.

In interpreting nearly identical statutory language, not "roughly similar" language (*cf.* Res. Br. at 45), in a previous version of Section 1988, this Court held that a provision allowing attorneys' fees does not include the authorization to recover fully expert witness fees, *see Casey*, 499 U.S. at 84-88. While respondents argue that this Court's holding in *Casey* "has no bearing here" because "the text and the purpose

of IDEA and Section 1988 are quite different" (Res. Br. at 45), neither the precedent of this Court, nor that of the Second Circuit, supports such a distinction.

Respondents argue that "the words 'attorneys' fees as part of the costs to the parents' authorize reimbursement of all costs parents incur in IDEA proceedings, including expert costs" (Res. Br. at 17). This is so, the respondents claim, because there are key textual differences between the IDEA and Section 1988, asserting that the phrase "costs to the parents" evidences a far different intent than the former text of Section 1988 which authorized "costs to the prevailing party" (Res. Br. at 45).

Respondents selective quotation of IDEA's attorneys' fees provision attempts to create a distinction with that version of Section 1988 construed by *Casey* which does not exist. Both statutes reward prevailing parties with "attorneys' fees as part of the costs." Costs in both statutes do not include recovery of expert fees beyond that which is authorized by Sections 1920(3) and 1821(b) of Title 28 of the United States Code. Since "the legislative history of the IDEA indicates that its fee-shifting provisions were intended to mirror those of 42 U.S.C. § 1988," *A.R. v. New York City Dep't of Educ.*, 407 F.3d 65, 73 n.9 (2d Cir. 2005), even the Second Circuit "continues to interpret the IDEA's fee-shifting provision in consonance with Section 1988 and other federal civil fee-shifting statutes," *id.* at 73 n.9.

D. A statute emanating from Congress' Spending Power must be construed narrowly.

The IDEA is a Spending Clause statute. *See Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 204 n.26 (1982); *see also Cedar Rapids Comty. Sch. Dist. v. Garrett F.*, 526 U.S. 66, 83-85 (1999) (Thomas,

J., joined by Kennedy, J., dissenting).[9] Contrary to Amici NDRN-CLE's claim that "there is no sound basis for subjecting Spending Clause legislation to different interpretive rules than legislation enacted under other sources of congressional power" (Amici Br. at 27), the Court has repeatedly emphasized that, when Congress places conditions on the receipt of federal funds under the Spending Clause, "it must do so unambiguously," *see, e.g., Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 17 (1981); *see also Rowley*, 458 U.S. at 190 n.11. This is because a law that "condition[s] an offer of federal funding on a promise by the recipient . . . amounts essentially to a contract between the Government and the recipient of funds." *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998).

While the respondents claim that the District's Spending Clause argument was not raised below and has been forfeited (Res. Br. at 48), both the Second Circuit and the district court acknowledged that the District had argued, *inter alia*, that expert fees are not available under the Act (Pet. App. A at 3a; Pet. App. B at 36a); the District's and the United States' reference to the Spending Clause is an amplification of why

9. Respondents and Amici NDRN-CLE's argument that the "IDEA is not just Spending Clause legislation" (Res. Br. at 16; Amici Br. at 27 n.24), is irrelevant since all statutes must be interpreted according to their plain meaning, not just those derived from Congress' Spending Power. While Amici NDRN-CLE suggest that the Court may imply the recovery of expert fees under the IDEA as it might imply a right of action (*cf.* Amici Br. at 29 n.25), private rights of action may not be implied against a public recipient of federal funds, *see Gonzaga Univ. v. Doe*, 536 U.S. 273, 287 (2002) (holding "that [Family Education Rights and Privacy Act]'s nondisclosure provisions fail to confer enforceable rights"); *Association of Cmty. Org. for Reform Now v. New York City Dep't of Educ.*, 269 F. Supp. 2d 338, 347 (S.D.N.Y. 2003) (holding that "the [No Child Left Behind Act] does not reflect the clear and unambiguous intent of Congress to create individually enforceable rights").

the statute should be interpreted according to its plain meaning, not an independent rationale. *Cf. TRW v. Andrews*, 534 U.S. 19, 34 (2001) (rejecting petitioner's attempt to raise an additional legal argument for review).

E. The majority view of the circuits does not construe the plain meaning of the IDEA's attorneys' fees provision as allowing for expert fees, given the absence of explicit statutory authority for such relief.

Respondents' analysis of available district court opinions on whether or not expert fees are available under the IDEA as costs (Res. Br. at 31 n.20) belie their previous position that the issue "is not sufficiently mature to warrant this Court's attention at this time" (Res. Br. in Opposition at 1). Previously, the District has cited a number of district court cases which have held that expert fees are not recoverable under the IDEA's attorneys' fees provision (Pet. for a Writ of Cert. at 14). Clearly, those district courts in the Seventh, Eighth and D.C. Circuits which had held that expert fees are recoverable under the IDEA have been corrected by the majority opinions of the circuit courts in *Goldring v. District of Columbia*, 416 F.3d 70 (D.C. Cir. 2005); *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022 (8th Cir. 2003) and *T.D. v. LaGrange Sch. Dist. No. 102*, 349 F.3d 469 (7th Cir. 2003).

Nonetheless, it is disingenuous for respondents to imply that conflicting authority from the district courts establishes the requisite statutory ambiguity to justify a foray into legislative history *and* to also argue that expert fees are "indisputably 'part of costs' parents incur in actions or proceedings under IDEA" (*Compare* Res. Br. at 17 *with* Res. Br. at 33-34). The statutory provision at issue is either ambiguous or it is not; it cannot be both at the same time. In interpreting the true meaning of the provision, the conflicting district court authority is as of much value to the Court as

the conflicting legislative history – both pale in comparison to the "best evidence" of the purpose of statutory text, which is the "text adopted by both Houses of Congress and submitted to the President." *See Casey*, 499 U.S. at 98. Congress in 1986, 1997 and/or 2004 could have easily shifted attorneys' fees and expert witness fees, but it chose instead to enact more restrictive language. Litigants under the Act are bound by that restriction.

F. Public policy does not require recovery of expert fees in IDEA proceedings.

1. The promise of a free appropriate public education is not dependent on parents' ability to recover expert fees.

The HCPA's amendment of the EHA to provide for the recovery of attorneys' fees to prevailing parents has succeeded in holding school districts accountable for their educational decisions and actions. See GAO, *Special Education: The Attorney Fees provision of Public Law 99-372* (HRD-90-22BR) at 3 (Nov. 1989).[10]

Although the respondents and their amici argue that parents of disabled students lack the resources to secure competent counsel or experts to sustain their burden in due process hearings (Res. Br. at 7 n.3, 14, 22; Amici NDRN-CLE Br. at 4), Congress made no such finding in either its 1997 or its 2004 reauthorization of the Act, *see* 20 U.S.C.

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10. The GAO's November 1989 Report identifies a significant difference between the number of administrative hearings scheduled and the number decided, which it attributes to settlement. The parent success rate (43%) is based on the hearings actually decided. For unexplained reasons, in determining success in civil actions (it recites 43% as well for this category) the Report uses "complaints" rather than "decisions" as the divisor. Using the later, as it did for administrative hearings, the success rate is 69%.

§ 1400(c); IDEIA § 601(c). Parents' access to an independent educational evaluation at public expense, *see* 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502(b)(1), levels any advantage in information and expertise that a school district might otherwise have, *see Schaffer v. Weast*, 546 U.S. __, 126 S. Ct. 528, 536 (2005). Here, the parents presented three independent evaluations at public expense in support of their successful claim for public reimbursement of the student's tuition to private school. *See Application of the Bd. of Educ. of the Arlington Cent. Sch. Dist.*, Appeal No. 99-65 (SRO Dec. 14, 1999).[11]

The kinds of questions that arise in special education cases tend not to depend on expert witnesses (*cf.* Res. Br. at 2, 15, 21-22; Amici NDRN-CLE Br. at 3, 15, 20; Amicus COPAA Br. at 14), as "adequate compliance with the procedures prescribed [in the Act] would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP," *Rowley*, 458 U.S. at 206.[12]

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11. Evaluations of the student were done by Mr. Gerald Brooks, a speech/language pathologist, on September 2, 1997 (he also later prepared a "summary statement" for the District's Committee on Special Education on May 13, 1998) and by Dr. Nancy Mashayekhi, a neuropsychologist, her first report completed on August 19, 1997 and her second one completed in September 1997. The District paid for the evaluations from Mr. Brooks and Dr. Mashayekhi. Mr. Brooks' description of the student as "severely functionally language disordered" is in contrast to achievement testing conducted by the District shortly before the 1998/99 school year. The District's testing evidenced that the student possessed an average level of functioning in reading, written language and mathematics (R. 430-431, 450, 520; Exs. SD-65, SD-85, SD-90, SD-92, SD-94, SD-95, SD-106).

12. Likewise, experts are not required to educate impartial hearing officers as suggested by Amici NDRN-CLE (Amici Br. at 9). Unless previously certified, impartial hearing officers in New York State must be admitted to the practice of law in the State of

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2. A holding that the IDEA authorizes the award of expert fees would violate Congress' intent to reduce litigation-related costs.

A key objective of the 2004 Amendments to the IDEA is to reduce the litigation costs for schools under the Act. *See Schaffer*, 126 S. Ct. at 535. More recent data than that supplied by Amici NDRN-CLE (*cf.* Amici Br. at 7-8) suggests that litigation in special education in New York State is on the rise:

> Beginning with the 2002/03 school year, the New York State Education Department began tracking the number of independent review hearings requested, and the number of hearing held. Between that year and the 2004/05 school year, the number of requests increased each year from 4,542 to 5,422, an increase of 20 percent.

See New York State Educ. Dep't, Office of Vocational and Educ. Serv. for Individuals with Disabilities, *IDEA Part B State Performance Plan 2005-2010* at 105 (Dec. 2005).

"Over the past 10 years the most common category in special education litigation is attorneys' fees," rather than cases about core issues under the IDEA, such as what constitutes a free, appropriate public education or a least

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New York, must be in good standing, and must have a minimum of two year practice and/or experience in the areas of education, special education, disability rights or civil rights. *See* N.Y. Comp. Codes R. & Regs. tit. 8(A-2), § 200.2(x)(1) (2005). Even if a hearing officer lacks expertise on some discrete educational topic, he or she may order an independent educational evaluation at public expense. *See* 34 C.F.R. § 300.502(d); N.Y. Comp. Codes R. & Regs. tit. 8(A-2), § 200.5(j)(3)(viii) (2005).

restrictive educational environment. *See* Mark Walsh, *Court to Weigh Expert Fees in IDEA Cases*, Education Week (Jan. 18, 2006) (*quoting* Perry A. Zirkel, a professor of education law at Lehigh University in Bethlehem, Pennsylvania and a state hearing officer for special education disputes).

As Amici National School Boards Association, American Association of School Administrators, New York State School Boards Association and New York State Council of School Superintendents point out, besides increasing litigation on the merits of parental challenges, authorizing the award of expert fees will burden courts with even more litigation involving fee disputes (Amici Br. at 19). If this Court affirms the Second Circuit's decision, the job of parsing out the fees related to expert witnesses, educational consultants and law advocates will require inordinate amounts of time and expense for both parties, adding to the costs of litigation.

CONCLUSION

The judgment of the Second Circuit should be reversed. Expert witness fees are not recoverable under the IDEA, which provides only for shifting of "reasonable attorneys' fees as part of the costs" associated with a proceeding under the Act. The IDEA contains no explicit statutory authority for the recovery of expert fees and provides no notice to either school districts or parents of the availability of such fees. The Second Circuit erred in relying on one sentence of a conference committee report to hold that expert fees are available under the IDEA. Contrary to the Second Circuit's reasoning, this Court's analysis in *Casey* does not authorize a departure from the language of the statute. The majority of the circuits have found the meaning of the statute to be plain and clear and there is no reason to depart from that meaning. Public policy does not require the recovery of expert fees in IDEA proceedings. The procedural protections in the IDEA level the playing field between parents and school districts and provide for an independent evaluation at public expense, among other safeguards, to allow the parents access to expert opinion at the point where it best serves the interests of the student, the development of the IEP.

Respectfully submitted,

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Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

ARLINGTON CENTRAL SCHOOL DISTRICT BOARD OF EDUCATION *v.* MURPHY ET VIR.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 05–18. Argued April 19, 2006—Decided June 26, 2006

After respondents prevailed in their Individuals with Disabilities Education Act (IDEA) action to require petitioner school board to pay for their son's private school tuition, they sought fees for services rendered by an educational consultant during the proceedings, relying on an IDEA provision that permits a court to "award reasonable attorneys' fees as part of the costs" to prevailing parents. 20 U. S. C. §1415(i)(3)(B). The District Court granted their motion in part. Affirming, the Second Circuit noted that, under *Crawford Fitting Co.* v. *J. T. Gibbons, Inc.*, 482 U. S. 437, and *West Virginia Univ. Hospitals, Inc.* v. *Casey*, 499 U. S. 83, a cost- or fee-shifting provision will not be read to permit recovery of expert fees without explicit statutory authority, but concluded that a congressional Conference Committee Report relating to §1415(i)(3)(B) and a footnote in *Casey* referencing that Report showed that the IDEA authorized such reimbursement.

Held: Section §1415(i)(3)(B) does not authorize prevailing parents to recover expert fees. Pp. 3–12.

(a) The resolution of this question is guided by the fact that Congress enacted the IDEA pursuant to the Spending Clause. While Congress has broad power to set the terms on which it disburses federal money to the States, any conditions it attaches to a State's acceptance of such funds must be set out "unambiguously." *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1, 17. Fund recipients are bound only by those conditions that they accept "voluntarily and knowingly," *ibid.*, and States cannot knowingly accept conditions of which they are "unaware" or which they are "unable to ascertain," *ibid.* Thus, the question here is whether the IDEA furnishes clear notice regarding expert fees. Pp. 3–4.

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(b) The Court begins with the IDEA's text, for if its "language is plain," the courts' function "'"is to enforce it according to its terms."'" *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N. A.*, 530 U. S. 1, 6. While §1415(i)(3)(B) provides for an award of "reasonable attorneys' fees," it does not even hint that acceptance of IDEA funds makes a State responsible for reimbursing prevailing parents for the services of experts. "Costs" is a term of art that does not generally include expert fees. The use of "costs" rather than "expenses" strongly suggests that §1415(i)(3)(B) was not meant to be an open-ended provision making States liable for all expenses. Moreover, §1415(i)(3)(B) says not that a court may award "costs" but that it may award attorney's fees "as part of the costs." This language simply adds reasonable attorney's fees to the list of recoverable costs set out in 28 U. S. C. §1920, the general statute covering taxation of costs, which is strictly limited by §1821. Thus, §1415(i)(3)(B)'s text does not authorize an award of additional expert fees, and it certainly fails to present the clear notice required by the Spending Clause. Other IDEA provisions point strongly in the same direction. Of little significance here is a provision in the Handicapped Children's Protection Act of 1986 requiring the General Accounting Office to collect data on awards to prevailing parties in IDEA cases, but making no mention of consultants or experts or their fees. And the fact that the provision directed the GAO to compile data on the hours spent by consultants in IDEA cases does not mean that Congress intended for States to compensate prevailing parties for fees billed by these consultants. Pp. 4–8.

(c) *Crawford Fitting Co.* and *Casey* strongly reinforce the conclusion that the IDEA does not unambiguously authorize prevailing parents to recover expert fees. *Crawford Fitting Co.*'s reasoning supports the conclusion that the term "costs" in §1415(i)(3)(B), like "costs" in Federal Rule of Civil Procedure 54(d), the provision at issue there, is defined by the categories of expenses enumerated in 28 U. S. C. §1920. This conclusion is buttressed by the principle, recognized in *Crawford Fitting Co.*, that no statute will be construed to authorize taxing witness fees as costs unless the statute "refer[s] explicitly to witness fees." 482 U. S., at 445. The conclusion that the IDEA does not authorize expert fee awards is confirmed even more dramatically by *Casey*, where the Court held that 42 U. S. C. §1988, a fee-shifting provision with wording virtually identical to that of 20 U. S. C. §1415(i)(3)(B), did not empower a district court to award expert fees to a prevailing party. 482 U. S., at 102. The Second Circuit misunderstood the meaning of the *Casey* footnote on which it relied. That footnote did not state that the Conference Committee Report set out the correct interpretation of §1415(i)(3)(B) or provided the clear

Syllabus

notice required under the Spending Clause. Its thrust was simply that "attorneys' fees," standing alone, is generally not understood as encompassing expert fees. Pp. 8–11.

(d) Respondents' additional arguments are unpersuasive. The IDEA's goals of "ensur[ing] that all children with disabilities have available to them a free appropriate public education," §1400(d)(1)(A), and of safeguarding parents' right to challenge adverse school decisions are too general to provide much support for their reading of the IDEA. And the IDEA's legislative history is insufficient help, where everything other than that history overwhelmingly suggests that expert fees may not be recovered. Pp. 11–12.

402 F. 3d 332, reversed and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, and THOMAS, JJ., joined. GINSBURG, J., filed an opinion concurring in part and concurring in the judgment. SOUTER, J., filed a dissenting opinion. BREYER, J., filed a dissenting opinion, in which STEVENS and SOUTER, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 05–18

ARLINGTON CENTRAL SCHOOL DISTRICT BOARD OF EDUCATION, PETITIONER *v.* PEARL MURPHY ET VIR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[June 26, 2006]

JUSTICE ALITO delivered the opinion of the Court.

The Individuals with Disabilities Education Act (IDEA or Act) provides that a court "may award reasonable attorneys' fees as part of the costs" to parents who prevail in an action brought under the Act. 111 Stat. 92, 20 U. S. C. §1415(i)(3)(B). We granted certiorari to decide whether this fee-shifting provision authorizes prevailing parents to recover fees for services rendered by experts in IDEA actions. We hold that it does not.

I

Respondents Pearl and Theodore Murphy filed an action under the IDEA on behalf of their son, Joseph Murphy, seeking to require petitioner Arlington Central School District Board of Education to pay for their son's private school tuition for specified school years. Respondents prevailed in the District Court, 86 F. Supp. 2d 354 (SDNY 2000), and the Court of Appeals for the Second Circuit affirmed, 297 F. 3d 195 (2002).

As prevailing parents, respondents then sought $29,350 in fees for the services of an educational consultant,

Marilyn Arons, who assisted respondents throughout the IDEA proceedings. The District Court granted respondents' request in part. It held that only the value of Arons' time spent between the hearing request and the ruling in respondents' favor could properly be considered charges incurred in an "action or proceeding brought" under the Act, see 20 U. S. C. §1415(i)(3)(B). 2003 WL 21694398, *9 (SDNY, July 22, 2003). This reduced the maximum recovery to $8,650. The District Court also held that Arons, a nonlawyer, could be compensated only for time spent on expert consulting services, not for time spent on legal representation, *id.*, at *4, but it concluded that all the relevant time could be characterized as falling within the compensable category, and thus allowed compensation for the full $8,650, *id.*, at *10.

The Court of Appeals for the Second Circuit affirmed. 402 F. 3d 332 (2005). Acknowledging that other Circuits had taken the opposite view, the Court of Appeals for the Second Circuit held that "Congress intended to and did authorize the reimbursement of expert fees in IDEA actions." *Id.*, at 336. The court began by discussing two decisions of this Court holding that expert fees could not be recovered as taxed costs under particular cost- or fee-shifting provisions. See *Crawford Fitting Co.* v. *J. T. Gibbons, Inc.*, 482 U. S. 437 (1987) (interpreting Fed. Rule Civ. Proc. 54(d) and 28 U. S. C. §1920); *West Virginia Univ. Hospitals, Inc.* v. *Casey*, 499 U. S. 83 (1991) (interpreting 42 U. S. C. §1988 (1988 ed.)). According to these decisions, the court noted, a cost- or fee-shifting provision will not be read to permit a prevailing party to recover expert fees without "'explicit statutory authority' indicating that Congress intended for that sort of fee-shifting." 402 F. 3d, at 336.

Ultimately, though, the court was persuaded by a statement in the Conference Committee Report relating to 20 U. S. C. §1415(i)(3)(B) and by a footnote in *Casey* that made reference to that Report. 402 F. 3d, at 336–337

(citing H. R. Conf. Rep. No. 99–687, p. 5 (1986)). Based on these authorities, the court concluded that it was required to interpret the IDEA to authorize the award of the costs that prevailing parents incur in hiring experts. 402 F. 3d, at 336.

We granted certiorari, 546 U. S. ____ (2006), to resolve the conflict among the Circuits with respect to whether Congress authorized the compensation of expert fees to prevailing parents in IDEA actions. Compare *Goldring* v. *District of Columbia*, 416 F. 3d 70, 73–77 (CADC 2005); *Neosho R-V School Dist.* v. *Clark ex rel. Clark*, 315 F. 3d 1022, 1031–1033 (CA8 2003); *T. D.* v. *LaGrange School Dist. No. 102*, 349 F. 3d 469, 480–482 (CA7 2003), with 402 F. 3d 332 (CA2 2005). We now reverse.

II

Our resolution of the question presented in this case is guided by the fact that Congress enacted the IDEA pursuant to the Spending Clause. U. S. Const., Art. I, §8, cl. 1; see *Schaffer* v. *Weast*, 546 U. S. ____ (2005). Like its statutory predecessor, the IDEA provides federal funds to assist state and local agencies in educating children with disabilities "and conditions such funding upon a State's compliance with extensive goals and procedures." *Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty.* v. *Rowley*, 458 U. S. 176, 179 (1982).

Congress has broad power to set the terms on which it disburses federal money to the States, see, *e.g.*, *South Dakota* v. *Dole*, 483 U. S. 203, 206–207 (1987), but when Congress attaches conditions to a State's acceptance of federal funds, the conditions must be set out "unambiguously," see *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1, 17 (1981); *Rowley*, *supra*, at 204, n. 26. "[L]egislation enacted pursuant to the spending power is much in the nature of a contract," and therefore, to be bound by "federally imposed conditions," recipients of federal funds

must accept them "voluntarily and knowingly." *Pennhurst*, 451 U. S., at 17. States cannot knowingly accept conditions of which they are "unaware" or which they are "unable to ascertain." *Ibid.* Thus, in the present case, we must view the IDEA from the perspective of a state official who is engaged in the process of deciding whether the State should accept IDEA funds and the obligations that go with those funds. We must ask whether such a state official would clearly understand that one of the obligations of the Act is the obligation to compensate prevailing parents for expert fees. In other words, we must ask whether the IDEA furnishes clear notice regarding the liability at issue in this case.

III

A

In considering whether the IDEA provides clear notice, we begin with the text. We have "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat. Bank* v. *Germain*, 503 U. S. 249, 253–254 (1992). When the statutory "language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N. A.*, 530 U. S. 1, 6 (2000) (quoting *United States* v. *Ron Pair Enterprises, Inc.*, 489 U. S. 235, 241 (1989), in turn quoting *Caminetti* v. *United States*, 242 U. S. 470, 485 (1917); internal quotation marks omitted).

The governing provision of the IDEA, 20 U. S. C. §1415(i)(3)(B), provides that "[i]n any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs" to the parents of "a child with a disability" who is the "prevailing party." While this provision provides for an award of "reasonable attorneys' fees," this provision does

not even hint that acceptance of IDEA funds makes a State responsible for reimbursing prevailing parents for services rendered by experts.

Respondents contend that we should interpret the term "costs" in accordance with its meaning in ordinary usage and that §1415(i)(3)(B) should therefore be read to "authorize reimbursement of all costs parents incur in IDEA proceedings, including expert costs." Brief for Respondents 17.

This argument has multiple flaws. For one thing, as the Court of Appeals in this case acknowledged, "'costs' is a term of art that generally does not include expert fees." 402 F. 3d, at 336. The use of this term of art, rather than a term such as "expenses," strongly suggests that §1415(i)(3)(B) was not meant to be an open-ended provision that makes participating States liable for all expenses incurred by prevailing parents in connection with an IDEA case—for example, travel and lodging expenses or lost wages due to time taken off from work. Moreover, contrary to respondents' suggestion, §1415(i)(3)(B) does not say that a court may award "costs" to prevailing parents; rather, it says that a court may award reasonable attorney's fees "as part of the costs" to prevailing parents. This language simply adds reasonable attorney's fees incurred by prevailing parents to the list of costs that prevailing parents are otherwise entitled to recover. This list of otherwise recoverable costs is obviously the list set out in 28 U. S. C. §1920, the general statute governing the taxation of costs in federal court, and the recovery of witness fees under §1920 is strictly limited by §1821, which authorizes travel reimbursement and a $40 per diem. Thus, the text of 20 U. S. C. §1415(i)(3)(B) does not authorize an award of any additional expert fees, and it certainly fails to provide the clear notice that is required under the Spending Clause.

Other provisions of the IDEA point strongly in the same

direction. While authorizing the award of reasonable attorney's fees, the Act contains detailed provisions that are designed to ensure that such awards are indeed reasonable. See §§1415(i)(3)(C)–(G). The absence of any comparable provisions relating to expert fees strongly suggests that recovery of expert fees is not authorized. Moreover, the lack of any reference to expert fees in §1415(d)(2) gives rise to a similar inference. This provision, which generally requires that parents receive "a full explanation of the procedural safeguards" available under §1415 and refers expressly to "attorneys' fees," makes no mention of expert fees.

B

Respondents contend that their interpretation of §1415(i)(3)(B) is supported by a provision of the Handicapped Children's Protection Act of 1986 that required the General Accounting Office (GAO) to collect certain data, §4(b)(3), 100 Stat. 797 (hereinafter GAO study provision), but this provision is of little significance for present purposes. The GAO study provision directed the Comptroller General, acting through the GAO, to compile data on, among other things: "(A) the specific amount of attorneys' fees, costs, and expenses awarded to the prevailing party" in IDEA cases for a particular period of time, and (B) "the number of hours spent by personnel, including attorneys and consultants, involved in the action or proceeding, and expenses incurred by the parents and the State educational agency and local educational agency." *Id.*, at 797–798.

Subparagraph (A) would provide some support for respondents' position if it directed the GAO to compile data on awards to prevailing parties of the expense of hiring consultants, but that is not what subparagraph (A) says. Subparagraph (A) makes no mention of consultants or

experts or their fees.[1]

Subparagraph (B) similarly does not help respondents. Subparagraph (B), which directs the GAO to study "the number of hours spent [in IDEA cases] by personnel, including . . . consultants," says nothing about the award of fees to such consultants. Just because Congress directed the GAO to compile statistics on the hours spent by consultants in IDEA cases, it does not follow that Congress meant for States to compensate prevailing parties for the fees billed by these consultants.

Respondents maintain that "Congress' direction to the GAO would be inexplicable if Congress did not anticipate that the expenses for 'consultants' would be recoverable," Brief for Respondents 19, but this is incorrect. There are many reasons why Congress might have wanted the GAO to gather data on expenses that were not to be taxed as costs. Knowing the costs incurred by IDEA litigants might be useful in considering future procedural amendments (which might affect these costs) or a future amendment regarding fee shifting. And, in fact, it is apparent that the

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[1]Because subparagraph (A) refers to both "costs" and "expenses" awarded to prevailing parties and because it is generally presumed that statutory language is not superfluous, it could be argued that this provision manifests the expectation that prevailing parties would be awarded certain "expenses" not included in the list of "costs" set out in 28 U. S. C. §1920 and that expert fees were intended to be among these unenumerated "expenses." This argument fails because, whatever expectation this language might seem to evidence, the fact remains that neither 20 U. S. C. §1415 nor any other provision of the IDEA authorizes the award of any "expenses" other than "costs." Recognizing this, respondents argue not that they are entitled to recover "expenses" that are not "costs," but that expert fees *are* recoverable "costs." As a result, the reference to awards of both "expenses" and "costs" does not support respondents' position. The reference to "expenses" may relate to IDEA actions brought in state court, §1415(i)(2)(A), where "expenses" other than "costs" might be receivable. Or the reference may be surplusage. While it is generally presumed that statutes do not contain surplusage, instances of surplusage are not unknown.

GAO study provision covered expenses that could not be taxed as costs. For example, the GAO was instructed to compile statistics on the hours spent by all attorneys involved in an IDEA action or proceeding, even though the Act did not provide for the recovery of attorney's fees by a prevailing state or local educational agency.[2] Similarly, the GAO was directed to compile data on "expenses incurred by the parents," not just those parents who prevail and are thus eligible to recover taxed costs.

In sum, the terms of the IDEA overwhelmingly support the conclusion that prevailing parents may not recover the costs of experts or consultants. Certainly the terms of the IDEA fail to provide the clear notice that would be needed to attach such a condition to a State's receipt of IDEA funds.

IV

Thus far, we have considered only the text of the IDEA, but perhaps the strongest support for our interpretation of the IDEA is supplied by our decisions and reasoning in *Crawford Fitting*, 482 U. S. 437, and *Casey*, 499 U. S. 83. In light of those decisions, we do not see how it can be said that the IDEA gives a State unambiguous notice regarding liability for expert fees.

In *Crawford Fitting*, the Court rejected an argument very similar to respondents' argument that the term "costs" in §1415(i)(3)(B) should be construed as an open-ended reference to prevailing parents' expenses. It was argued in *Crawford Fitting* that Federal Rule of Civil

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[2]In 2000, the attorneys' fees provision provided only an award to prevailing parents. See 20 U. S. C. §1415(i)(3)(B). In 2004, Congress amended §1415(i)(3)(B) to include two additional awards. See §101, 118 Stat. 2724. The amendments provided awards "to a prevailing party who is a State educational agency or local educational agency" where the complaint filed is frivolous or presented for an improper purpose, such as to harass, delay, or increase the cost of litigation. See 20 U. S. C. A. §§1415(i)(3)(B)(i)(II)–(III) (Supp. 2006).

Procedure 54(d), which provides for the award of "costs" to a prevailing party, authorizes the award of costs not listed in 28 U. S. C. §1821. 482 U. S., at 439. The Court held, however, that Rule 54(d) does not give a district judge "discretion to tax whatever costs may seem appropriate"; rather, the term "costs" in Rule 54(d) is defined by the list set out in §1920. *Id.*, at 441. Because the recovery of witness fees, see §1920(3), is strictly limited by §1821, the Court observed, a broader interpretation of Rule 54(d) would mean that the Rule implicitly effected a partial repeal of those provisions. *Id.*, at 442. But, the Court warned, "[w]e will not lightly infer that Congress has repealed §§1920 and 1821, either through Rule 54(d) or any other provision not referring explicitly to witness fees." *Id.*, at 445.

The reasoning of *Crawford Fitting* strongly supports the conclusion that the term "costs" in 20 U. S. C. §1415(i)(3)(B), like the same term in Rule 54(d), is defined by the categories of expenses enumerated in 28 U. S. C. §1920. This conclusion is buttressed by the principle, recognized in *Crawford Fitting*, that no statute will be construed as authorizing the taxation of witness fees as costs unless the statute "refer[s] explicitly to witness fees." 482 U. S., at 445; see also *ibid.* ("absent explicit statutory or contractual authorization for the taxation of the expenses of a litigant's witness as costs, federal courts are bound by the limitations set out in 28 U. S. C. §1821 and §1920").

Our decision in *Casey* confirms even more dramatically that the IDEA does not authorize an award of expert fees. In *Casey*, as noted above, we interpreted a fee-shifting provision, 42 U. S. C. §1988, the relevant wording of which was virtually identical to the wording of 20 U. S. C. §1415(i)(3)(B). Compare *ibid.* (authorizing the award of "reasonable attorneys' fees as part of the costs" to prevailing parents) with 42 U. S. C. §1988(b) (1988 ed.) (permit-

ting prevailing parties in certain civil rights actions to be awarded "a reasonable attorney's fee as part of the costs"). We held that §1988 did not empower a district court to award expert fees to a prevailing party. *Casey*, *supra*, at 102. To decide in favor of respondents here, we would have to interpret the virtually identical language in 20 U. S. C. §1415 as having exactly the opposite meaning. Indeed, we would have to go further and hold that the relevant language in the IDEA *unambiguously means* exactly the opposite of what the nearly identical language in 42 U. S. C. §1988 was held to mean in *Casey*.

The Court of Appeals, as noted above, was heavily influenced by a *Casey* footnote, see 402 F. 3d, at 336–337 (quoting 499 U. S., at 91–92, n. 5), but the court misunderstood the footnote's meaning. The text accompanying the footnote argued, based on an analysis of several fee-shifting statutes, that the term "attorney's fees" does not include expert fees. *Id.*, at 88–91. In the footnote, we commented on petitioners' invocation of the Conference Committee Report relating to 20 U. S. C. §1415(i)(3)(B), which stated: "'The conferees intend[ed] that the term "attorneys' fees as part of the costs" include reasonable expenses and fees of expert witnesses and the reasonable costs of any test or evaluation which is found to be necessary for the preparation of the . . . case.'" 499 U. S., at 91–92, n. 5 (quoting H. R. Conf. Rep. No. 99–687, at 5; ellipsis in original). This statement, the footnote commented, was "an apparent effort to *depart* from ordinary meaning and to define a term of art." 499 U. S., at 92, n. 5. The footnote did not state that the Conference Committee Report set out the correct interpretation of §1415(i)(3)(B), much less that the Report was sufficient, despite the language of the statute, to provide the clear notice required under the Spending Clause. The thrust of the footnote was simply that the term "attorneys' fees," standing alone, is generally not understood as encompassing expert fees. Thus, *Crawford*

Fitting and *Casey* strongly reinforce the conclusion that the IDEA does not unambiguously authorize prevailing parents to recover expert fees.

V

Respondents make several arguments that are not based on the text of the IDEA, but these arguments do not show that the IDEA provides clear notice regarding the award of expert fees.

Respondents argue that their interpretation of the IDEA furthers the Act's overarching goal of "ensur[ing] that all children with disabilities have available to them a free appropriate public education," 20 U. S. C. §1400(d)(1)(A) as well as the goal of "safeguard[ing] the rights of parents to challenge school decisions that adversely affect their child." Brief for Respondents 20. These goals, however, are too general to provide much support for respondents' reading of the terms of the IDEA. The IDEA obviously does not seek to promote these goals at the expense of all other considerations, including fiscal considerations. Because the IDEA is not intended in all instances to further the broad goals identified by the respondents at the expense of fiscal considerations, the goals cited by respondents do little to bolster their argument on the narrow question presented here.[3]

Finally, respondents vigorously argue that Congress clearly intended for prevailing parents to be compensated for expert fees. They rely on the legislative history of §1415 and in particular on the following statement in the

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[3]Respondents note that a GAO report stated that expert witness fees are reimbursable expenses. See Brief for Respondents 19 (citing GAO, Special Education: The Attorney Fees Provision of Public Law 99–372, p. 13 (Nov. 1989)). But this passing reference in a report issued by an agency not responsible for implementing the IDEA is plainly insufficient to provide clear notice regarding the scope of the conditions attached to the receipt of IDEA funds.

Conference Committee Report, discussed above: "The conferees intend that the term 'attorneys' fees as part of the costs' include reasonable expenses and fees of expert witnesses and the reasonable costs of any test or evaluation which is found to be necessary for the preparation of the . . . case." H. R. Conf. Rep. No. 99–687, at 5.

Whatever weight this legislative history would merit in another context, it is not sufficient here. Putting the legislative history aside, we see virtually no support for respondents' position. Under these circumstances, where everything other than the legislative history overwhelming suggests that expert fees may not be recovered, the legislative history is simply not enough. In a Spending Clause case, the key is not what a majority of the Members of both Houses intend but what the States are clearly told regarding the conditions that go along with the acceptance of those funds. Here, in the face of the unambiguous text of the IDEA and the reasoning in *Crawford Fitting* and *Casey*, we cannot say that the legislative history on which respondents rely is sufficient to provide the requisite fair notice.

* * *

We reverse the judgment of the Court of Appeals for the Second Circuit and remand the case for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 05–18

ARLINGTON CENTRAL SCHOOL DISTRICT BOARD OF EDUCATION, PETITIONER *v.* PEARL MURPHY ET VIR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[June 26, 2006]

JUSTICE GINSBURG, concurring in part and concurring in the judgment.

I agree, in the main, with the Court's resolution of this case, but part ways with the Court's opinion in one respect. The Court extracts from *Pennhurst State School and Hospital* v. *Halderman,* 451 U. S. 1, 17 (1981), a "clear notice" requirement, and deems it applicable in this case because Congress enacted the Individuals with Disabilities Education Act (IDEA), as it did the legislation at issue in *Pennhurst*, pursuant to the Spending Clause. *Ante*, at 3–4. That extraction, in my judgment, is unwarranted. *Pennhurst*'s "clear notice" requirement should not be unmoored from its context. The Court there confronted a plea to impose "an unexpected condition for compliance—a new [programmatic] obligation for participating States." *Bell* v. *New Jersey,* 461 U. S. 773, 790, n. 17 (1983). The controversy here is lower key: It concerns not the educational programs IDEA directs school districts to provide, but "the remedies available against a noncomplying [district]." *Ibid*; see *post*, at 9–11 (BREYER, J., dissenting).

The Court's repeated references to a Spending Clause derived "clear notice" requirement, see *ante*, at 3–4, 6, 8, 11, and n. 3, 12, are questionable on other grounds as well. For one thing, IDEA was enacted not only pursuant to

Congress' Spending Clause authority, but also pursuant to §5 of the Fourteenth Amendment. See *Smith* v. *Robinson*, 468 U. S. 992, 1009 (1984) (IDEA's predecessor, the Education of the Handicapped Act, was "set up by Congress to aid the States in complying with their constitutional obligations to provide public education for handicapped children."). Furthermore, no "clear notice" prop is needed in this case given the twin pillars on which the Court's judgment securely rests. First, as the Court explains, *ante*, at 4–6, the specific, attorneys'-fees-oriented, provisions of IDEA, *i.e.*, 20 U. S. C. §1415(i)(3)(B)–(G); §1415(d)(2)(L), "overwhelmingly support the conclusion that prevailing parents may not recover the costs of experts or consultants," *ante*, at 8. Those provisions place controls on fees recoverable for attorneys' services, without mentioning costs parents might incur for other professional services and controls geared to those costs. Second, as the Court develops, prior decisions closely in point "strongly suppor[t]," even "confir[m] . . . dramatically," today's holding that IDEA trains on attorneys' fees and does not authorize an award covering amounts paid or payable for the services of an educational consultant. *Ante*, at 9 (citing *Crawford Fitting Co.* v. *J. T. Gibbons, Inc.*, 482 U. S. 437 (1987), and *West Virginia Univ. Hospitals, Inc.* v. *Casey*, 499 U. S. 83 (1991)).

For the contrary conclusion, JUSTICE BREYER's dissent relies dominantly on a Conference Report stating the conferees' view that the term "attorneys' fees as part of the costs" includes "expenses and fees of expert witnesses" and payments for tests necessary for the preparation of a case. H. R. Conf. Rep. No. 99–687, p. 5 (1986) (internal quotation marks omitted).[1] Including costs of consultants and

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[1]The relevant statement from the Conference Report reads in its entirety:

"The conferees intend that the term 'attorneys' fees as part of the

tests in §1415(i)(3)(B) would make good sense in light of IDEA's overarching goal, *i.e.*, to provide a "free appropriate public education" to children with disabilities, §1400(d)(1)(A). See *post*, at 5–8 (BREYER, J., dissenting). But Congress did not compose §1415(i)(3)(B)'s text,[2] as it did the texts of other statutes too numerous and varied to ignore, to alter the common import of the terms "attorneys' fees" and "costs" in the context of expense-allocation legislation. See, *e.g.*, 42 U. S. C. §1988(c) (2000 ed. and Supp. III) (added in 1991 specifically to "include expert fees as part of the attorney's fee"); *Casey*, 499 U. S., at 88–92, and n. 4 (citing variously composed *statutes* that "explicitly shift expert . . . fees *as well as* attorney's fees"). Given the

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costs' include reasonable expenses and fees of expert witnesses and the reasonable costs of any test or evaluation which is found to be necessary for the preparation of the parent or guardian's case in the action or proceeding, as well as traditional costs incurred in the course of litigating a case." H. R. Conf. Rep. 99–687, at 5.

Although the Conference Report goes on to consider other matters, including controls on attorneys' fees, nothing further is said on expert witness fees or test costs.

[2]At the time the Conference Report was submitted to the Senate and House, sponsors of the legislation did not mention anything on the floor about expert or consultant fees. They were altogether clear, however, that the purpose of the legislation was to "reverse" this Court's decision in *Smith* v. *Robinson*, 468 U. S. 992 (1984). In *Smith*, the Court held that, under the statute as then designed, prevailing parents were not entitled to attorneys' fees. See 132 Cong. Rec. 16823 (1986) (remarks of Sen. Weicker) ("In adopting this legislation, we are rejecting the reasoning of the Supreme Court in Smith versus Robinson."); *id.*, at 16824 (remarks of Sen. Kerry) ("This vital legislation reverses a U. S. Supreme Court decision Smith versus Robinson[ ]"); *id.*, at 17608–17609 (remarks of Rep. Bartlett) ("I support those provisions in the conference agreement that, in response to the Supreme Court decision in . . . Smith versus Robinson, authoriz[e] the awarding of reasonable attorneys' fees to parents who prevail in special education court cases."); *id.*, at 17609 (remarks of Rep. Biaggi) ("This legislation clearly supports the intent of Congress back in 1975 and corrects what I believe was a gross misinterpretation of the law. Attorneys' fees should be provided to those individuals who are being denied access to the educational system.").

constant meaning of the formulation "attorneys' fees as part of the costs" in federal legislation, we are not at liberty to rewrite "the statutory text adopted by both Houses of Congress and submitted to the President," *id.*, at 98, to add several words Congress wisely might have included. The ball, I conclude, is properly left in Congress' court to provide, if it so elects, for consultant fees and testing expenses beyond those IDEA and its implementing regulations already authorize,[3] along with any specifications, conditions, or limitations geared to those fees and expenses Congress may deem appropriate. Cf. §1415(i)(3)(B)–(G); §1415(d)(2)(L) (listing only attorneys' fees, not expert or consulting fees, among the procedural safeguards about which school districts must inform parents).

In sum, although I disagree with the Court's rationale to the extent that it invokes a "clear notice" requirement tied to the Spending Clause, I agree with the Court's discussion of IDEA's terms, *ante*, at 4–6, and of our decisions in *Crawford* and *Casey*, *ante*, at 8–11. Accordingly, I concur in part in the Court's opinion, and join the Court's judgment.

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[3]Under 34 C. F. R. §300.502(b)(1) (2005), a "parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency."

SUPREME COURT OF THE UNITED STATES

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[June 26, 2006]

JUSTICE SOUTER, dissenting.

I join JUSTICE BREYER's dissent and add this word only to say outright what would otherwise be implicit, that I agree with the distinction he draws between this case and *Barnes* v. *Gorman*, 536 U. S. 181 (2002). See *post*, at 10–11 (citing *Barnes*, *supra*, at 191 (SOUTER, J., concurring)). Beyond that, I emphasize the importance for me of §4 of the Handicapped Children's Protection Act of 1986, 100 Stat. 797, as amended, 20 U. S. C. A. §1415 note, which mandated the study by what is now known as the Government Accountability Office. That section, of equal dignity with the fee-shifting provision enacted by the same statute, makes JUSTICE BREYER's resort to the related Conference Report the reasonable course.

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[June 26, 2006]

JUSTICE BREYER, with whom JUSTICE STEVENS and JUSTICE SOUTER join, dissenting.

The Individuals with Disabilities Education Act (IDEA or Act), 20 U. S. C. A. §1400 *et seq.*, (Supp. 2006), says that a court may "award reasonable attorneys' fees as part of the costs to the parents" who are prevailing parties. §1415(i)(3)(B). Unlike the Court, I believe that the word "costs" includes, and authorizes payment of, the costs of experts. The word "costs" does not define its own scope. Neither does the phrase "attorneys' fees as part of costs." But Members of Congress did make clear their intent by, among other things, approving a Conference Report that specified that "the term 'attorneys' fees as part of the costs' include[s] reasonable expenses of expert witnesses and reasonable costs of any test or evaluation which is found to be necessary for the preparation of the parent or guardian's case in the action or proceeding." H. R. Conf. Rep. No. 99–687, p. 5 (1986); Appendix A, *infra*, at 19. No Senator or Representative voiced *any* opposition to this statement in the discussion preceding the vote on the Conference Report—the last vote on the bill before it was sent to the President. I can find no good reason for this Court to interpret the language of this statute as meaning the precise opposite of what Congress told us it intended.

I

There are two strong reasons for interpreting the statutory phrase to include the award of expert fees. First, that is what Congress said it intended by the phrase. Second, that interpretation furthers the IDEA's statutorily defined purposes.

A

Congress added the IDEA's cost-shifting provision when it enacted the Handicapped Children's Protection Act of 1986 (HCPA), 100 Stat. 796. Senator Lowell Weicker introduced the relevant bill in 1985. 131 Cong. Rec. 1979–1980 (1985). As introduced, it sought to overturn this Court's determination that the then-current version of the IDEA (and other civil rights statutes) did not authorize courts to award attorneys' fees to prevailing parents in IDEA cases. See *Smith* v. *Robinson*, 468 U. S. 992 (1984). The bill provided that "[i]n any action or proceeding brought under this subsection, the court, in its discretion, may award a reasonable attorney's fee as part of the costs to a parent or legal representative of a handicapped child or youth who is the prevailing party." 131 Cong. Rec. 1980; see S. Rep. No. 99–112, p. 2 (1985).

After hearings and debate, several Senators introduced a new bill in the Senate that would have put a cap on attorneys' fees for legal services lawyers, but at the same time would have explicitly authorized the award of "a reasonable attorney's fee, reasonable witness fees, and *other reasonable expenses of the civil action*, in addition to the costs to a parent . . . who is the prevailing party." *Id.*, at 7 (emphasis added). While no Senator objected to the latter provision, some objected to the cap. See, *e.g.*, *id.*, at 17–18 (Additional Views of Senators Kerry, Kennedy, Pell, Dodd, Simon, Metzenbaum and Matsunaga) (accepting cost-shifting provision, but objecting to cap and other aspects of the bill). A bipartisan group of Senators, led by

Senators Hatch and Weicker, proposed an alternative bill that authorized courts to award "a reasonable attorney's fee in addition to the costs to a parent" who prevailed. *Id.*, at 15–16 (Additional Views of Senators Hatch, Weicker, Stafford, Dole, Pell, Matsunaga, Simon, Kerry, Kennedy, Metzenbaum, Dodd, and Grassley); 131 Cong. Rec. 21389.

Senator Weicker explained that the bill:

> "will enable courts to compensate parents for *whatever reasonable costs they had to incur to fully secure what was guaranteed to them by the EHA*. As in other fee shifting statutes, it is our intent that such awards will include, at the discretion of the court, reasonable attorney's fees, *necessary expert witness fees, and other reasonable expenses which were necessary for parents to vindicate their claim to a free appropriate public education for their handicapped child*." *Id.*, at 21390 (emphasis added).

Not a word of opposition to this statement (or the provision) was voiced on the Senate floor, and S. 415 passed without a recorded vote. *Id.*, at 21393.

The House version of the bill also reflected an intention to authorize recovery of expert costs. Following the House hearings, the Committee on Education and Labor produced a substitute bill that authorized courts to "award reasonable attorneys' fees, *expenses and costs*" to prevailing parents. H. R. Rep. No. 99–296, pp. 1, 5 (1985) (emphasis added). The House Report stated that

> "The phrase 'expenses and costs' includes *expenses of expert witnesses; the reasonable costs of any study, report, test, or project which is found to be necessary for the preparation of the parents' or guardian's due process hearing, state administrative review or civil action;* as well as traditional costs and expenses incurred in the course of litigating a case (e.g., depositions and interrogatories)." *Id.*, at 6 (emphasis added).

No one objected to this statement. By the time H. R. 1523 reached the floor, another substitute bill was introduced. 131 Cong. Rec. 31369 (1985). This new bill did not change in any respect the text of the authorization of expenses and costs. It did add a provision, however, that directed the General Accounting Office (GAO)—now known as the Government Accountability Office, see 31 U. S. C. A. §731 *note* (Supp. 2006)—to study and report to Congress on the fiscal impact of the cost-shifting provision. See *id.*, at 31369–31370. The newly substituted bill passed the House without a recorded vote. *Id.*, at 31377.

Members of the House and Senate (including all of the primary sponsors of the HCPA) then met in conference to work out certain differences. At the conclusion of those negotiations, they produced a Conference Report, which contained the text of the agreed-upon bill and a "Joint Explanatory Statement of the Committee of the Conference." See H. R. Conf. Rep. No. 99–687 (1986), Appendix A, *infra*. The Conference accepted the House bill's GAO provision with "an amendment expanding the data collection requirements of the GAO study to include information regarding the amount of funds expended by local educational agencies and state educational agencies on civil actions and administrative proceedings." *Id.*, at 7. And it accepted (with minor changes) the cost-shifting provisions provided in both the Senate and House versions. The conferees explained:

> "With slightly different wording, both the Senate bill and the House amendment provide for the awarding of attorneys' fees in addition to costs. The Senate recedes to the House and the House recedes to the Senate with an amendment clarifying that 'the court, in its discretion, may award reasonable attorneys' fees as part of the costs . . .' This change in wording incorporates the Supreme Court['s] *Marek* v. *Chesny* deci-

> sion [473 U. S 1 (1985)]. *The conferees intend that the term 'attorneys' fees as part of the costs' include reasonable expenses and fees of expert witnesses and the reasonable costs of any test or evaluation which is found to be necessary for the preparation of the parent or guardian's case in the action or proceeding, as well as traditional costs incurred in the course of litigating a case.*" *Id.*, at 5 (emphasis added; citation omitted).

The Conference Report was returned to the Senate and the House. A motion was put to each to adopt the Conference Report, and both the Senate and the House agreed to the Conference Report by voice votes. See Appendix B, *infra*, at 22 (Senate); Appendix C, *infra*, at 23 (House). No objection was raised to the Conference Report's statement that the cost-shifting provision was intended to authorize expert costs. I concede that "sponsors of the legislation did not mention anything on the floor about expert or consultant fees" at the time the Conference Report was submitted. *Ante*, at 3, n. 2 (GINSBURG, J., concurring in part and concurring in judgment). But I do not believe that silence is significant in light of the fact that *every* Senator and *three of the five* Representatives who spoke on the floor had previously *signed his name* to the Conference Report—a Report that made Congress' intent clear on the first page of its explanation. See Appendix A, *infra*, at 19. And every Senator and Representative that took the floor preceding the votes voiced his strong support for the Conference Report. 132 Cong. Rec. 16823–16825 (1986) (Senate); *id.*, at 17607–17612 (House). The upshot is that Members of both Houses of Congress voted to adopt both the statutory text before us and the Conference Report that made clear that the statute's words include the expert costs here in question.

B

The Act's basic purpose further supports interpreting

the provision's language to include expert costs. The IDEA guarantees a "free" and "appropriate" public education for "all" children with disabilities. 20 U. S. C. A. §1400(d)(1)(A) (Supp. 2006); see also §1401(9)(A) (defining "free appropriate public education" as one "provided at public expense," "without charge"); §1401(29) (defining "special education" as "specially designed instruction, at *no cost* to parents, to meet the unique needs of a child with a disability" (emphasis added)).

Parents have every right to become involved in the Act's efforts to provide that education; indeed, the Act encourages their participation. §1400(c)(5)(B) (IDEA "ensur[es] that families of [disabled] children have meaningful opportunities to participate in the education of their children at school"). It assures parents that they may question a school district's decisions about what is "appropriate" for their child. And in doing so, they may secure the help of experts. §1415(h)(1) (parents have "the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities"); see generally *Schaffer* v. *Weast*, 546 U. S. ___, ___ (2005) (slip op., at 3–4) (detailing Act's procedures); *Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty.* v. *Rowley*, 458 U. S. 176, 205–206 (1982) (emphasizing importance of Act's procedural guarantees).

The practical significance of the Act's participatory rights and procedural protections may be seriously diminished if parents are unable to obtain reimbursement for the costs of their experts. In IDEA cases, experts are necessary. See Kuriloff & Goldberg, Is Mediation a Fair Way to Resolve Special Education Disputes? First Empirical Findings, 2 Harv. Negotiation L. Rev. 35, 40 (1997) (detailing findings of study showing high correlation between use of experts and success of parents in challenging school-district's plan); Kuriloff, Is Justice Served by Due

Process?: Affecting the Outcome of Special Education Hearings in Pennsylvania, 48 Law & Contemp. Prob. 89, 100–101, 109 (1985) (same); see also Brief for National Disability Rights Network et al. as *Amici Curiae* 6–15 (collecting sources); cf. *Schaffer*, *supra*, at ___ (slip op., at 5) (GINSBURG, J., dissenting) ("[T]he vast majority of parents whose children require the benefits and protections provided in the IDEA lack knowledge about the educational resources available to their child and the sophistication to mount an effective case against a district-proposed IEP" (internal quotation marks and alterations omitted)).

Experts are also expensive. See Brief for Respondents 28, n. 17 (collecting District Court decisions awarding expert costs ranging from $200 to $7,600, and noting three reported cases in which expert awards exceeded $10,000). The costs of experts may not make much of a dent in a school district's budget, as many of the experts they use in IDEA proceedings are already on the staff. Cf. *Oberti* v. *Board of Ed. Clementon School Dist.*, 995 F. 2d 1204, 1219 (CA3 1993). But to parents, the award of costs may matter enormously. Without potential reimbursement, parents may well lack the services of experts entirely. See Department of Education, M. Wagner et al., The Individual and Household Characteristics of Youth With Disabilities: A Report from the National Longitudinal Transition Study–2 (NLTS–2), pp. 3–5 (Aug. 2003) (finding that 25% of disabled children live in poverty and 65% live in households with incomes less than $50,000); see Department ofEducation, M. Wagner et al., The Children We Serve: The Demographic Characteristics of Elementary and Middle School Students with Disabilities and Their Households, p. 28 (Sept. 2002), available at http://www.seels.net/designdocs/SEELS_Children_We_Serve_Report.pdf (as visited June 23, 2006, and available in Clerk of Court's case file) (finding that 36% of disabled

children live in households with incomes of $25,000 or less).

In a word, the Act's statutory right to a "free" and "appropriate" education may mean little to those who must pay hundreds of dollars to obtain it. That is why this Court has previously avoided interpretations that would bring about this kind of result. See *School Comm. of Burlington* v. *Department of Ed. of Mass.*, 471 U. S. 359 (1985) (construing IDEA provision granting equitable authority to courts to include the power to order reimbursement for parents who switch their child to private schools if that decision later proves correct); *id.*, at 370 (without cost reimbursement for prevailing parents, "the child's right to a *free* appropriate public education, the parents' right to participate fully in developing a proper individualized education plan (IEP), and all of the procedural safeguards would be less than complete"); *Florence County School Dist. Four* v. *Carter*, 510 U. S. 7, 13 (1993) (holding that prevailing parents are not barred from reimbursement for switching their child to a private school that does not meet the IDEA's definition of a free and appropriate education). In *Carter*, we explained: "IDEA was intended to ensure that children with disabilities receive an education that is both appropriate and free. To read the provisions of §1401(a)(18) to bar reimbursement in the circumstances of this case would defeat this statutory purpose." *Id.*, at 13–14 (citation omitted).

To read the word "costs" as requiring successful parents to bear their own expenses for experts suffers from the same problem. Today's result will leave many parents and guardians "without an expert with the firepower to match the opposition," *Schaffer*, *supra*, at __ (slip op., at 11), a far cry from the level playing field that Congress envisioned.

II

The majority makes essentially three arguments against

this interpretation. It says that the statute's purpose and "legislative history is simply not enough" to overcome: (1) the fact that this is a Spending Clause case; (2) the text of the statute; and (3) our prior cases which hold that the term "costs" does not include expert costs. *Ante*, at 12. I do not find these arguments convincing.

A

At the outset the majority says that it "is guided by the fact that Congress enacted the IDEA pursuant to the Spending Clause." *Ante*, at 3. "In a Spending Clause case," the majority adds, "the key is not what a majority of the Members of both Houses intend but what the States are clearly told regarding the conditions that go along with the acceptance of those funds." *Ante*, at 12. Thus, the statute's "conditions must be set out 'unambiguously.'" *Ante*, at 3–4 (citing *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1, 17 (1981) and *Rowley*, 458 U. S., at 204, n. 26). And "[w]e must ask" whether the statute "furnishes clear notice regarding the liability at issue in this case." *Ante*, at 4.

I agree that the statute on its face does not *clearly* tell the States that they must pay expert fees to prevailing parents. But I do not agree that the majority has posed the right question. For one thing, we have repeatedly examined the nature and extent of the financial burdens that the IDEA imposes without reference to the Spending Clause or any "clear-statement rule." See, *e.g.*, *Burlington*, *supra*, at 369 (private school fees); *Carter*, *supra*, at 13 (same); *Smith*, 468 U. S., at 1010–1011 (attorneys' fees); *Cedar Rapids Community School Dist.* v. *Garret F.*, 526 U. S. 66, 76–79 (1999) (continuous nursing service); but see *id.*, at 83 (THOMAS, J., joined by KENNEDY, J., dissenting). Those cases did not ask whether the statute "furnishes clear notice" to the affirmative obligation or liability at issue.

For another thing, neither *Pennhurst* nor any other case suggests that *every spending detail* of a Spending Clause statute must be spelled out with unusual clarity. To the contrary, we have held that *Pennhurst*'s requirement that Congress "unambiguously" set out "a condition on the grant of federal money" does *not* necessarily apply to legislation setting forth "*the remedies available against a noncomplying State.*" *Bell* v. *New Jersey*, 461 U. S. 773, 790, n. 17 (1983) (emphasis added) (rejecting *Pennhurst*-based argument that Elementary and Secondary Education Act of 1965 did not unambiguously provide that the Secretary could recover federal funds that are misused by a State). We have added that *Pennhurst* does not require Congress "specifically" to "identify" and "proscribe *each* condition in [Spending Clause] legislation." *Jackson* v. *Birmingham Bd. of Ed.*, 544 U. S. 167, 183 (2005) (rejecting argument that *Pennhurst* precluded interpreting Title IX's private cause of action to encompass retaliation (internal quotation marks and alterations omitted)); see also *Bennett* v. *Kentucky Dept. of Ed.*, 470 U. S. 656, 665–666 (1985). And we have denied any implication that "suits under Spending Clause legislation are suits in contract, or that contract-law principles apply to *all* issues that they raise." *Barnes* v. *Gorman*, 536 U. S. 181, 188–189, n. 2 (2002) (emphasis added).

These statements and holdings are not surprising. After all, the basic objective of *Pennhurst*'s clear-statement requirement does not demand textual clarity in respect to every detail. That is because ambiguity about the precise nature of a statutory program's details—particularly where they are of a kind that States might have anticipated—is rarely relevant to the basic question: Would the States have accepted the Federal Government's funds *had they only known* the nature of the accompanying conditions? Often, the later filling-in of details through judicial interpretation will not lead one to wonder whether fund-

ing recipients would have agreed to enter the basic program at all. Given the nature of such details, it is clear that the States would have entered the program regardless. At the same time, to view each statutory detail of a highly complex federal/state program (involving say, transportation, schools, the environment) simply through the lens of linguistic clarity, rather than to assess its meanings in terms of basic legislative purpose, is to risk a set of judicial interpretations that can prevent the program, overall, from achieving its basic objectives or that might well reduce a program in its details to incoherence.

This case is about just such a detail. Permitting parents to recover expert fees will not lead to awards of "indeterminate magnitude, untethered to compensable harm" and consequently will not "pose a concern that recipients of federal funding could not reasonably have anticipated." *Barnes*, 536 U. S., at 191 (SOUTER, J., joined by O'Connor, J., concurring) (citation and internal quotation marks omitted). Unlike, say, punitive damages, an award of costs to expert parties is neither "unorthodox" nor "indeterminate," and thus does not throw into doubt whether the States would have entered into the program. *Id.*, at 188. If determinations as to whether the IDEA requires States to provide continuing nursing services, *Cedar Rapids, supra*, or reimbursement for private school tuition, *Burlington, supra*, do not call for linguistic clarity, then the precise content of recoverable "costs" does not call for such clarity here *a fortiori*.

B

If the Court believes that the statute's language is unambiguous, I must disagree. The provision at issue says that a court "may award reasonable attorneys' fees as part of the costs" to parents who prevail in an action brought under the Act. 20 U. S. C. A. §1415(i)(3)(B) (Supp. 2006). The statute neither defines the word "costs" nor

points to any other source of law for a definition. And the word "costs," alone, says nothing at all about which costs falls within its scope.

Neither does the statutory phrase—"as part of the costs to the parents of a child with a disability who is the prevailing party"—taken in its entirety unambiguously foreclose an award of expert fees. I agree that, read literally, that provision does not clearly grant authority to award any costs at all. And one might read it, as the Court does, as referencing another federal statute, 28 U. S. C. §1920, which provides that authority. See *ante*, at 5; see also §1920 (federal taxation of cost statute). But such a reading is not inevitable. The provision (indeed, the entire Act) says nothing about that other statute. And one can, consistent with the language, read the provision as both embodying a general authority to award costs while also specifying the inclusion of "reasonable attorneys' fees" as part of those costs (as saying, for example, that a court "may award reasonable attorneys' fees as part of [a] costs [award]").

This latter reading, while linguistically the less natural, is legislatively the more likely. The majority's alternative reading, by cross-referencing only the federal general cost-awarding statute (which applies solely *in federal courts*), would produce a jumble of different cost definitions applicable to similar IDEA administrative and state-court proceedings in different States. See §1920 ("A judge or clerk of *any court of the United States* may tax as costs the following. . . ." (emphasis added)). This result is particularly odd, as all IDEA actions must begin in state due process hearings, where the federal cost statute clearly does not apply, and the overwhelming majority of these actions are never appealed to *any* court. See GAO, Report to the Ranking Minority Member, Committee on Health, Education, Labor and Pensions, U. S. Senate, Special Education: Numbers of Formal Disputes are Generally

Low and States Are Using Mediation and Other Strategies to Resolve Conflicts (GAO–03–897), p. 13 (2003) (approximately 3,000 administrative hearings annually; under 10% appealed to state or federal court); see also *Moore* v. *District of Columbia*, 907 F. 2d 165, 166 (CADC 1990) (en banc) (joining other Circuits in holding that IDEA authorizes an "award of attorney fees to a parent who prevails in [IDEA] administrative proceedings"). And when parents do appeal, they can file their actions in either state or federal courts. 20 U. S. C. A. §1415(i)(2)(A) (Supp. 2006).

Would Congress "obviously" have wanted the content of the word "costs" to vary from State to State, proceeding to proceeding? *Ante*, at 5. Why? At most, the majority's reading of the text is plausible; it is not the only possible reading.

C

The majority's most persuasive argument does not focus on either the Spending Clause or lack of statutory ambiguity. Rather, the majority says that "costs" is a term of art. In light of the law's long practice of excluding expert fees from the scope of the word "costs," along with this Court's cases interpreting the word similarly in other statutes, the "legislative history is simply not enough." *Ante*, at 12.

I am perfectly willing to assume that the majority is correct about the traditional scope of the word "costs." In two cases this Court has held that the word "costs" is limited to the list set forth in 28 U. S. C. §1920 and does not include fees paid to experts. See *Crawford Fitting Co.* v. *J. T. Gibbons, Inc.*, 482 U. S. 437 (1987) (interpreting Fed. Rule Civ. Proc. 54(d)); *West Virginia Univ. Hospitals, Inc.* v. *Casey*, 499 U. S. 83 (1991) (interpreting 42 U. S. C. §1988 (1988 ed.)). But Congress is free to redefine terms of art. See, *e.g.*, *Casey*, 499 U. S., at 88–90 (citing examples of statutes that shift "'costs of litigation (including . . . expert witness fees)'"). And we have suggested that it might well

do so through a statutory provision worded in a manner similar to the statute here—indeed, we cited the Conference Report language here at issue. *Id.*, at 91–92, n. 5 (characterizing language as an "apparent effort to *depart* from ordinary meaning and to define a term of art" and noting that Congress made no such "effort" in respect to 42 U. S. C. §1988).

Regardless, here the statute itself indicates that Congress did not intend to use the word "costs" as a term of art. The HCPA, which added the cost-shifting provision (in §2) to the IDEA, also added another provision (in §4) directing the GAO to "conduct a study of the impact of the amendments to the [IDEA] made by section 2" over a 3½ year period following the Act's effective date. §4(a), 100 Stat. 797. To determine the fiscal impact of §2 (the cost-shifting provision), §4 ordered the GAO to submit a report to Congress containing, among other things, the following information:

> "Data, for a geographically representative select sample of States, indicating (A) *the specific amount of attorneys' fees, costs, and expenses awarded to the prevailing party*, in each action and proceeding under [§2] from the date of the enactment of this Act through fiscal year 1988, *and* the range of such *fees, costs and expenses* awarded in the actions and proceedings under such section, categorized by type of complaint and (B) for the same sample as in (A) *the number of hours spent by personnel, including attorneys and consultants*, involved in the action or proceeding, and expenses incurred by the parents and the State educational agency and local educational agency." §4(b)(3), *id.*, at 797–798 (emphasis added).

If Congress intended the word "costs" in §2 to authorize an award of only those costs listed in the federal cost statute, why did it use the word "expenses" in §4(b)(3)(A)

as part of the "amount awarded to the prevailing party"? When used as a term of art, after all, "costs" does not cover expenses. Nor does the federal costs statute cover any expenses—at least not any that Congress could have wanted the GAO to study. Cf. 28 U. S. C. §1920 (referring only once to "expenses," and doing so solely to refer to special interpretation services provided in actions initiated by the United States).

Further, why did Congress, when asking the GAO (in the statute itself) to study the "numbers of hours spent by personnel" include among those personnel both attorneys "*and consultants*"? Who but experts could those consultants be? Why would Congress want the GAO to study the hours that those experts "spent," unless it thought that it would help keep track of the "costs" that the statute imposed?

Of course, one might, through speculation, find other answers to these questions. One might, for example, imagine that Congress wanted the GAO to study the expenses that payment of expert fees engendered in state-court proceedings where state, but not federal, law requires that "'expenses' other than 'costs' might be receivable." *Ante*, at 7, n. 1; but see *supra*, at 12-13. Or one might think that the word "expenses" is surplusage. *Ante*, at 7, n. 1; but see *Duncan* v. *Walker*, 533 U. S. 167, 174 (2001) (expressing Court's "'reluctan[ce] to treat statutory terms as surplusage in any setting,'" but especially when they play "a pivotal role in the statutory scheme"). Or one might believe that Congress was interested in the hours these experts spent, but not in the fees they obtained. *Ante*, at 7. But these answers are not necessarily consistent with the purpose of the GAO study provision, a purpose revealed by the language of the provision and its position in the statute. Its placement and its reference to §2 indicate that Congress ordered the study to help it keep track of the magnitude of the reimbursements that an

earlier part of the new statute (namely, §2) mandated. See 100 Stat. 797 (stating that purpose of GAO study was to determine the "impact" of "section 2"). And the *only* reimbursement requirement that §2 mandates is the payment of "costs."

But why speculate about this? We *know* what Congress intended the GAO study to cover. It *told* the GAO in its Conference Report that the word "costs" included the costs of experts. And, not surprisingly, the GAO made clear that it understood precisely what Congress asked it to do. In its final report, the GAO wrote: "Parents can receive reimbursement from state or local education agencies for some or all of their attorney fees *and related expenses* if they are the prevailing party in part or all of administrative hearings or court proceedings. *Expert witness fees, costs of tests or evaluations found to be necessary during the case, and court costs for services rendered during administrative and court proceedings are examples of reimbursable expenses.*" GAO, Briefing Report to Congressional Requesters, Special Education: The Attorney Fees Provision of Public Law 99–372 GAO/HRD–22BR, p. 13 (Nov. 1989). At the very least, this amounts to *some* indication that Congress intended the word "costs," not as a term of art, not as it was used in the statutes at issue in *Casey* and *Crawford Fitting*, but rather as including certain additional "expenses." If that is so, the claims of tradition, of the interpretation this Court has given other statutes, cannot be so strong as to prevent us from examining the legislative history. And that history could not be more clear about the matter: Congress intended the statutory phrase "attorneys' fees as part of the costs" to include the costs of experts. See Part I, *supra*.

III

For the reasons I have set forth, I cannot agree with the majority's conclusion. Even less can I agree with its fail-

ure to consider fully the statute's legislative history. That history makes Congress' purpose clear. And our ultimate judicial goal is to interpret language in light of the statute's purpose. Only by seeking that purpose can we avoid the substitution of judicial for legislative will. Only by reading language in its light can we maintain the democratic link between voters, legislators, statutes, and ultimate implementation, upon which the legitimacy of our constitutional system rests.

In my view, to keep faith with that interpretive goal, we must retain all traditional interpretive tools—text, structure, history, and purpose. And, because faithful interpretation is art as well as science, we cannot, through rule or canon, rule out the use of any of these tools, automatically and in advance. Cf. *Helvering* v. *Gregory*, 69 F. 2d 809, 810–811 (CA2 1934) (L. Hand, J.).

Nothing in the Constitution forbids us from giving significant weight to legislative history. By disregarding a clear statement in a legislative report adopted without opposition in both Houses of Congress, the majority has reached a result no Member of Congress expected or overtly desired. It has adopted an interpretation that undercuts, rather than furthers, the statute's purpose, a "free" and "appropriate" public education for "all" children with disabilities. See *Circuit City Stores, Inc.* v. *Adams*, 532 U. S. 105, 133 (2001) (STEVENS, J., joined by SOUTER, GINSBURG, and BREYER, JJ., dissenting) ("A method of statutory interpretation that is deliberately uninformed, and hence unconstrained, may produce a result that is consistent with a court's own views of how things should be, but it may also defeat the very purpose for which a provision was enacted"). And it has adopted an approach that, I fear, divorces law from life. See *Duncan*, *supra*, at 193 (BREYER, J., joined by GINSBURG, J., dissenting).

For these reasons, I respectfully dissent.

APPENDIX A TO OPINION OF BREYER, J.

99TH CONGRESS *2d Session*	HOUSE OF REPRESENTATIVES	REPORT 99-687

HANDICAPPED CHILDREN'S PROTECTION ACT OF 1986

JULY 16, 1986.—Ordered to be printed

Mr. HAWKINS, from the committee of conference, submitted the following

CONFERENCE REPORT

[To accompany S. 415]

The committee of conference on the disagreeing votes of the two Houses on the amendments of the House to the bill (S. 415), to amend the Education of the Handicapped Act to authorize the award of reasonable attorneys' fees to certain prevailing parties, and to clarify the effect of the Education of the Handicapped Act on rights, procedures, and remedies under other laws relating to the prohibition of discrimination, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its disagreement to the amendment of the House to the text of the bill and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the House amendment, insert the following:

[Text of Act omitted.]

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two Houses on the amendment of the House to the bill (S. 415) to authorize the award of attorneys' fees to certain prevailing parties, and to clarify the effect of the Education of the Handicapped Act on rights, procedures, and remedies under other laws relating to the prohibition of discrimination, and for other purposes, submit the following joint statement to the House and the Senate in explanation of the effect

of the action agreed upon by the managers and recommended in the accompanying conference report. The differences between the Senate bill and the House amendment and the substitute agreed to in the conference, are noted below, except for clerical corrections, conforming changes made necessary by agreements reached by the conferees, and minor drafting and clarifying changes.

1. The Senate bill provides for "a reasonable attorney's fee."

The House amendment provides for "reasonable attorneys' fees."

The Senate recedes.

2. With slightly different wording, both the Senate bill and the House amendment provide for the awarding of attorneys' fees in addition to costs.

The Senate recedes to the House and the House recedes to the Senate with an amendment clarifying that "the court, in its discretion, may award reasonable attorneys' fees as part of the costs . . ." This change in wording incorporates the Supreme Court *Marek* v. *Chesny* decision (87 L. Ed. 2d 1).

The conferees intend that the term "attorneys' fees as part of the costs" include reasonable expenses and fees of expert witnesses and the reasonable costs of any test or evaluation which is found to be necessary for the preparation of the parent or guardian's case in the action or proceeding, as well as traditional costs incurred in the course of litigating a case.

3. The Senate bill provides for the award of attorney's fees "to a parent or legal representative."

The House amendment provides for the award of attorneys' fees "to the parents or guardian."

The Senate recedes.

4. The Senate bill limits the amount of the fee awarded whenever a parent or legal representative is represented by a publicly funded organization which provides legal services.

The House amendment provides that fee awards shall be based on prevailing rates in the community.

The House recedes to the Senate and the Senate recedes to the House with an amendment clarifying that "fees awarded under this subsection shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished." See, *Hensley* v. *Eckerhart*, 461 U.S. 424 (1983); *Marek* v. *Chesny*, 87 L. Ed 2d 1 (1985); and *Blum* v. *Stenson*, 104 S. Ct. 1541 (1984). However, no such awards of attorneys' fees shall be calculated by using bonuses or multipliers. The conferees want to make it clear that the inclusion of the prohibition against calculation of fees using bonuses and multipliers is limited to cases brought only under part B of the Education of the Handicapped Act. The conferees do not intend in any way to diminish the applicability of interpretation by the U.S. Supreme Court regarding bonuses and multipliers to other statutes such as 42 U.S.C. 1988. See, *Hensley* v. *Eckerhart*, *Blum* v. *Stenson*, *Evans* v. *Jeff D.*, 106 S. Ct. 1531 (1986). In addition, several new sections would be added to clarify that under part B of the Education of the Handicapped Act, no award of attorneys' fees and related costs subject to the provision of the act may be made for services performed subsequent to the time a written offer of settlement is made to a party (if the

offer is made at least 10 days prior to the date of the action or proceeding) if the offer is not accepted within ten days and a court or administrative officer finds that the relief finally obtained by the party is not more favorable to the parent or guardian than the offer of settlement. However, attorneys' fees may be awarded to a prevailing parent or guardian who was substantially justified in rejecting the settlement offer. Furthermore, the court shall reduce accordingly the amount of attorneys' fees and related expenses otherwise allowable if they determine that:

(1) the parent or guardian, during the course of the action or proceeding unreasonably protracted the final resolution of the controversy;

(2) the amount of attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, experience and reputation; or

(3) the time spent and legal services furnished were excessive considering the nature of the action or proceeding.

Finally, the preceding situations in which the court reduces the amount of fees and related expenses otherwise allowable shall not apply if the local or state educational agency is determined to have unreasonably protracted the final resolution of the action or proceeding or if a violation of section 615 of the Education of the Handicapped Act is found.

The conferees intend that this provision clarify the application of the *Marek* v. *Chesny* decision to the Handicapped Children's Protection Act. One exception is made to the applicability of the *Marek* v. *Chesny* decision. When the parent or guardian is substantially justified in rejecting the settlement offer, the *Marek* v. *Chesny* decision would not apply. Substantial justification for rejection would include relevant pending court decisions which could have an impact on the case in question.

In enumerating three conditions under which the amount of attorneys' fees would be reduced, the committee intends to protect against excessive reimbursement. The second condition is a codification of the policy for awarding fees in footnote 11 of *Blum* v. *Stenson*.

5. The House amendment, but not the Senate bill, specifies that fees, expenses, and costs awarded to the prevailing party may not be paid with the funds provided under part B of EHA. The report accompanying the Senate's bill restates existing policy that bars the payment of such fees and the costs under part B.

The House recedes. The conferees wish to emphasize that existing law bars payment of attorneys' fees with funds appropriated under B of EHA.

6. The House amendment, but not the Senate bill, provides for a GAO study of the impact of the bill authorizing the awarding of fees and costs.

The Senate recedes to the House with an amendment expanding the data collection requirements of the GAO study to include information regarding the amount of funds expended by local educational agencies and state educational agencies on civil actions and administrative proceedings.

7. The House amendment, but not the Senate bill, sunsets the court's authority to award fees at the administrative level after a period of time specified in the legislation.

The House recedes.

8. With slightly different wording, both the Senate bill and the House amendment authorize the filing of civil actions under legal authorities other than part B of EHA so long as parents first exhaust administrative remedies available under part B of EHA to the same extent as would be required under that part.

The House recedes. It is the conferees' intent that actions brought under 42 U.S.C. 1983 are governed by this provision.

9. The House amendment, but not the Senate bill, requires public access to hearing decisions.

The House recedes. The conferees wish to emphasize that public access to hearing decisions is existing law.

10. The House amendment, but not the Senate bill, requires that the public educational agency provide parents with an opportunity to meet informally in an attempt to resolve a complaint.

The House recedes.

11. The House amendment, but not the Senate bill, includes an anti-retaliation provision.

The House recedes. It is the conferees' intent that no person may discharge, intimidate, retaliate, threaten, coerce, or otherwise take an adverse action against any person because such person has filed a complaint, testified, furnished information, assisted or participated in any manner in a meeting, hearing, review, investigation, or other activity related to the administration of, exercise of authority under, or right secured by part B of EHA. The term "person" the first time it is used means a state educational agency, local educational agency, intermediate educational unit or any official or employee thereof.

12. The House amendment, but not the Senate bill, makes retroactive its provision regarding the effect of EHA on other laws (section 3).

The House recedes.

AUGUSTUS F. HAWKINS,
MARIO BIAGGI,
PAT WILLIAMS,
CHARLES A. HAYES,
MATTHEW G. MARTINEZ,
DENNIS E. ECKART,
Managers on the Part of the House.

ORRIN HATCH,
LOWELL P. WEICKER, Jr.,
DON NICKLES,
TED KENNEDY,
JOHN F. KERRY,
Managers on the Part of the Senate.

APPENDIX B TO OPINION OF BREYER, J.

Excerpts from Congressional Record
132 Cong. Rec. 16823–16825 (1986) (Senate)

HANDICAPPED CHILDREN'S PROTECTION ACT—CONFERENCE REPORT

Mr. WEICKER. Mr. President, I submit a report of the committee of conference on S. 415 and ask for its immediate consideration.

The PRESIDING OFFICER. The report will be stated.

The legislative clerk read as follows:

The committee of conference on the disagreeing votes of the two Houses on the amendments of the House to the bill (S. 415) to amend the Education of the Handicapped Act to authorize the award of reasonable attorneys' fees to certain prevailing parties, and to clarify the effect of the Education of the Handicapped Act on rights, procedures, and remedies under other laws relating to the prohibition on discrimination, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses this report, signed by a majority of the conferees.

The PRESIDING OFFICER. Without objection, the Senate will proceed to the consideration of the conference report.

[Floor statements omitted.]

Mr. WEICKER. Mr. President, I move adoption of the conference report.

The PRESIDING OFFICER. The question is on agreeing to the conference report.

The conference report was agreed to.

Mr. WEICKER. Mr. President, I move to reconsider the vote by which the conference report was agreed to.

APPENDIX C TO OPINION OF BREYER, J.

Excerpts from Congressional Record
132 Cong. Rec. 17607–17612 (House)

CONFERENCE REPORT ON S. 415, HANDICAPPED CHILDREN'S PROTECTION ACT OF 1986

Mr. WILLIAMS. Mr. Speaker, I call up the conference report on the Senate bill (S. 415) to amend the Education of the Handicapped Act to authorize the award of reasonable attorneys' fees to certain prevailing parties, and to clarify the effect of the Education of the Handicapped Act on rights, procedures, and remedies under other laws relating to the prohibition of discrimination.

The Clerk read the title of the Senate bill.

[Floor statements omitted.]

Mr. WILLIAMS. Mr. Speaker, I yield back the balance of my time, and I move the previous question on the conference report.

The previous question was ordered.

The conference report was agreed to.